Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

SINCERELY YOURS, INC., ET AL.,
Petitioners,

v.

BERTRAM COOPER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Full Gospel Interdenominational Church in Manchester, Connecticut, is one of thousands of private entities nationwide that operate a contract postal unit (CPU), *i.e.*, a private property from which postal products are sold on consignment according to a contract with the U.S. Postal Service. The church operates its CPU on its own property—identified as such—and presents in that facility a number of wall-hangings and other displays containing messages about its various ministries. Certain patrons, fully cognizant of the church's operation of the CPU, of the private status of the property, and of the church as the source of the messages found in the CPU, nonetheless object on Establishment Clause grounds to the church's speech, claiming that the church's speech should be legally classified as that of the federal government because of its proximity to the postal contract endeavor.

1. Do observers of religious speech have Article III standing to challenge that speech on Establishment Clause grounds merely because they object to its presence or feel uncomfortable observing it?

2. May the speech of a church about its own ministries, presented on its own property, at its own initiative, and exclusively under its own control, be classified as speech of the federal government and constitute a violation of the Establishment Clause?

PARTIES TO THE PROCEEDINGS

In addition to Sincerely Yours, Inc., the following parties were defendants-appellants in the Second Circuit and are petitioners here:

Full Gospel Interdenominational Church, Inc.
Dr. Phillip Saunders Heritage Association, Inc.

In addition to respondent Bertram Cooper who was plaintiff-appellee in the Second Circuit, the following parties, who were intervening appellees in the Second Circuit, are also respondents:

Gary Chipman
Kimon N. Karath
Leslie Strong

The following parties are defendants before the district court, were not appellants in the Second Circuit, and are not parties in this proceeding:

United States Postal Service
John E. Potter, Postmaster General of the United States Postal Service
Ronald G. Boyne, Postmaster of the Manchester, Connecticut Post Office

RULE 29.6 STATEMENT

Sincerely Yours, Inc. states that it is a corporation organized and owned by Full Gospel Interdenominational Church in the State of Connecticut. Sincerely Yours, Inc. is not publicly held.

Full Gospel Interdenominational Church, Inc. states that it is a non-profit corporation in the State of Connecticut. Full Gospel Interdenominational Church, Inc. does not have a parent corporation and is not publicly held.

Dr. Philip Saunders Heritage Association, Inc. states that it is a corporation organized and owned by Full Gospel Interdenominational Church in the State of Connecticut. Dr. Philip Saunders Heritage Association, Inc. is not publicly held.

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INTRODUCTION

The court below ruled that a plaintiff who felt "uncomfortable" when near religious displays on a religious organization's property has suffered an injury authorizing federal court jurisdiction over his complaint about those displays. In so ruling, the Second Circuit followed the consensus position among the courts of appeal that any person harboring subjective angst over allegedly government action may bring a federal case about it—provided that case asserts an Establishment Clause violation. But by validating as a cognizable injury the ephemeral, indistinct experience of psychological unease, and by treating Establishment Clause claimants as exempt from the Article III standards that apply to all other federal court claimants, the Second Circuit's decision conflicts with this Court's precedents.

This case presents to this Court an ideal vehicle through which to clarify what constitutes injury for Article III standing in the Establishment Clause context. At a minimum, this case should be held pending the outcome of the standing questions presented in cases now before the Court, including *Salazar v. Buono*, 129 S.Ct. 1313 (2009) (*certiorari* granted) (argued October 7, 2009), and *Boy Scouts of America v. Barnes-Wallace*, U.S. No. 08-1222 (March 31, 2009) (*certiorari* pending). Alternately, the mootness of the plaintiff's claim combined with the intervenors' lack of standing makes this case appropriate for vacatur under *United States v. Munsingwear*, 340 U.S. 36 (1950).

On the merits, the court below ruled that speech of a church presented on its own property where it operates a contract postal unit (CPU) is speech of the federal government, and constitutes an Establishment Clause violation because the church presented that speech for a religious purpose. Instead of directing its Establishment Clause analysis to the U.S. Postal Service's neutral administrative terms which leave equally unregulated the speech of all of the thousands of private CPU operators, the Second Circuit enigmatically applied the *Lemon* test to the private speech of one particular religious contractor. The court's unprecedented analysis compounds errors of classification and evaluation in conflict with numerous decisions of this Court, and turns the First Amendment in on itself—by imposing on a private party a restriction that only applies to the government.

This Court should grant review.

OPINIONS BELOW

All the decisions below are captioned *Cooper v. U.S. Postal Service*. The Second Circuit's opinion is reported at 577 F.3d 479 (2d Cir. 2009). App. A. The district court's decision on summary judgment and injunctive relief is reported at 482 F.Supp.2d 278 (D.Conn. 2007). App. B. The district court's opinion amending its injunction is reported at 245 F.R.D. 60 (D.Conn. 2007). App. C.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit issued its decision on August 20, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The text of Article III, section 2, clause 1 of the U.S. Constitution, and of the First Amendment to the U.S. Constitution, are set forth in Appendix D.

STATEMENT OF THE CASE

I. Material facts

The United States Postal Service administers a nation-wide program in which it contracts with private parties to sell postal products and services on private property. JA334.[1] Such private contractors operate what is called a "Contract Postal Unit," or "CPU." The CPU program serves to expand the number of outlets for sale of postal products while relieving the financially-constrained Postal Service of the expense and responsibility of maintaining a facility and staff of employees of its own. JA310. Over five thousand CPUs are operated by private parties in locations as diverse as private homes, seminaries, hardware stores, groceries, and gas stations. App. 6a.

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[1] "JA" refers to the joint appendix submitted to the Second Circuit by defendants-appellants on February 27, 2008.

A number of CPUs are operated by religious entities, *id.*, including sectarian universities, seminaries, religious bookstores, camps, a Catholic Press Society, and Catholic sisters organizations. JA983-84. The religious character of a contracting party is not a consideration the Postal Service deems relevant to the qualifications for participation in the CPU program. JA991-1013, JA1138-39, JA1042. And the contracts that govern the relationship between the Postal Service and CPU operators do not restrict or otherwise regulate private religious speech on the private property where the contract functions are fulfilled. App. 8a, JA1050, JA132, JA991-1013.

Petitioner Sincerely Yours, Inc. (SYI), a corporation organized and owned by petitioner Full Gospel Interdenominational Church, operates a CPU in the town of Manchester, Connecticut. Petitioner Dr. Philip Saunders Heritage Association, Inc., owns the property on which SYI operates its CPU, and is a wholly owned subsidiary of the Full Gospel Interdenominational Church. (Collectively, Petitioners are referred to herein as "the church.") The church's CPU operates in a storefront facility on Main Street in Manchester, just down the road from the main church campus. JA154, JA262. The church operates its storefront facility for the purpose of both providing a much-desired commercial service for the community, JA 68-69, and serving as an outreach and informational forum for the church's ministries. JA252-54.

The church's facility is marked with various signs identifying it as the "Sincerely Yours, Inc. Contract Postal Unit." App. 10a. A sign greeting

patrons inside the front door of the church's CPU states: "The Full Gospel Interdenominational Church is so delighted to serve you—our community. We are dedicated to making your visit with us a pleasant and successful one for all of your mailing needs. Sincerely Yours." JA282; JA20 ¶24. A sign placed on the counter where transactions with the public are conducted presents the following: "Sincerely Yours, Inc. United States Contract Postal Unit is operated by the Full Gospel Interdenominational Church. Thank you for your patronage." (JA80, ¶12(a)(2).) Additionally, two signs bearing the postal eagle identify the facility as a "United States Post Office Contract Unit." JA101.

Inside the facility, the church has posted a number of photographs and other displays which detail or otherwise exhibit its ministries. For instance, on one wall is a framed display urging those seeking prayer to contact the church office. JA76-77 ¶9 (j); JA239. The church makes "prayer cards" available that contain the name and telephone number of the church, and present space in which to write prayer requests. JA241. The church placed on the transaction counter a receptacle into which patrons may place these cards. App. 11a. Other displays in the church's CPU include a description of the church's humanitarian mission organization "World-Wide Lighthouse Missions" (WWLM); pamphlets which describe and present photos of overseas missionary service of WWLM ministers, JA73-77 ¶9-10; and a television monitor presents varied videos relating to WWLM, the church, and the church's ministries. JA78-79 ¶11. The USPS has prominently posted the

following disclaimer on the counter where transactions with the public occur: "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit." JA80, JA98-99.

Mr. Bertram Cooper, while a resident of Manchester, filed a lawsuit against the Postal Service asserting that the church's CPU operation violates the Establishment Clause. Cooper knew that the religious speech found in the church's CPU is the speech of the church (JA18 ¶14, JA19 ¶¶21-22, JA20 ¶24, JA21 ¶27) and he understood that the CPU system involves private parties operating the postal units. (JA18 ¶14, JA19 ¶21, JA20 ¶24.) Nonetheless, Cooper testified via affidavit that "the religious displays at Sincerely Yours made me feel very uncomfortable." JA65 ¶5.

While this case was pending on appeal, Cooper moved out of Manchester into a nursing home in a neighboring city, and he no longer sought postal products in Manchester. App. 12a n.8. To avoid having the case mooted on appeal, counsel for Cooper moved the Second Circuit to allow the intervention of three additional plaintiffs into the case: Gary Chipman, Kimon Karath, and Leslie Strong. *Id.* These proposed Intervenors testified by affidavit that they had recently learned of Cooper's potential inability to defend the district court judgment on appeal, and they sought to intervene solely to defend on appeal the district court judgment. Affidavits of Proposed Intervenors, ¶¶5, 6, attached to Motion to Intervene, filed with Second Circuit April 30, 2008. They further testified that

they regularly frequent the Sincerely Yours, Inc. CPU, and that they "object" to the displays in the church's facility. *Id.* at ¶3. The proposed intervenors did not assert that they found the displays offensive, that they were coerced to view them, or that their "objection" was anything other than ideological. The court of appeals granted them intervention on June 18, 2008. App. 11a n.8.

II. Proceedings Below

A. District Court

On October 3, 2003, Bertram Cooper sued the United States Postal Service and certain of its employees, alleging *inter alia* that the Establishment Clause was violated by the church's speech displayed at the Sincerely Yours, Inc. CPU. He sought injunctive and declaratory relief. Complaint (Dkt. 1). Thereafter, the church parties were granted intervention as defendants. (Dkt. 29). After discovery, Cooper and the Postal Service filed cross-motions for summary judgment. Defs.' SJ motion (Dkt. 38); Pls.' SJ Motion (Dkt. 41). The district court denied Defendants' motion for summary judgment and granted Cooper's motion. App. B (Dkt. 72). In so ruling, the court held that the church's operation of the CPU converted it into the federal government for such purposes, and that the church had violated the Establishment Clause by its presentation in the CPU of messages about its ministries.

The district court did not evaluate whether the church's speech should be classified as private or

governmental under the terms of Establishment Clause or Speech Clause case law. Instead the court employed "state action" case law to assess whether the church might be classified as a state actor and thus automatically bound by the Establishment Clause. App. 17b-36b. Moreover, in classifying the status of the church's speech, the district court did not evaluate the speech itself, but instead the church's participation in the CPU contract. *Id.*

The district court first analyzed whether the church could be classified as the federal government by means of identifying its CPU operation as a "public function." App. 19b-21b. The court found that the church's mail receipt and consignment sale of postal products could not be considered a public function, because those endeavors (widely engaged by private entities) are not now, and never have been, the exclusive function of the government—the standard by which a "public function" status is adjudged. App. 27b-29b.

While denying that the church's CPU operations were a "public function," the court identified the church's wall-hangings at its CPU to be the actions of the federal government because Sincerely Yours, Inc. and the government were "entwined" through the contractual relationship governing the CPU operation. App. 35b-36b. The court's classification inquiry here did not evaluate whether the government was entwined in the presentation of the church's *speech*—that is, the matter about which plaintiff complained—but rather whether the government was entwined with the *postal contract*

functions—about which plaintiff did not complain. *See* App. 29b-36b.

The district court thereafter applied the *Lemon* test to the church and found it violated all three prongs of that test. App. 39b-43b.

The district court issued an injunction against the church and the Postal Service, requiring the removal of all religious speech from the interior of the church's facility housing its CPU. App. 50b. The court additionally enjoined the Postal Service to remove all religious speech from all CPUs across the country. *Id.* Upon the Postal Service's motion for reconsideration of that latter order, the court determined that Cooper did not have standing to obtain relief as against the thousands of CPUs across the country, and thus narrowed its injunction exclusively to the church's CPU in Manchester. App. 12c.

On November 11, 2007, the court granted the church's motion for a stay of its injunction pending appeal. (Dkt. 99.)

B. Second Circuit

The Postal Service and the church appealed the district court's judgment to the Second Circuit. The Postal Service later withdrew its appeal. App. 13a.

1. Standing assessment

On August 20, 2009, the Second Circuit issued its opinion. The threshold question which the court

adjudicated was whether Cooper had standing.[2] Notably, the court lamented the inadequate guidance of extant precedents and strongly signaled its desire for this Court to clarify Article III standing in Establishment Clause cases. The court identified the standing determination in the Establishment Clause realm as a "tough question," App. 15a, one that is "vexed," *id.* at 16a, "difficult," *id.* at 15a n.9, and one for which "[t]here are serious arguments on both sides of th[e] question." *Id.* at 16a. The Court further observed that the question is one on which "the Courts of Appeals have divided," *id.* (internal quotation marks omitted), and quoted the Eighth Circuit to the effect that "[n]o governing precedent describes the injury in fact required to establish standing in a religious display case," *id.* at 15a (internal quotation marks omitted). The Second Circuit also opined that this Court "has announced no reliable and handy principles of analysis," *id.*, and that "[l]ower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached." *Id.* at 16a. "In short, there is uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context." *Id.* at 17a.

The court acknowledged that intervention had been granted to the new plaintiffs-appellees to salvage the litigation. App. 4a ("Cooper stopped using the CPU when he entered a nursing home, but the suit has continued on behalf of three intervenors

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[2] On April 3, 2009, the parties had submitted post-hearing letter briefs to the court addressing the question of the plaintiffs-appellees' standing.

who are similarly aggrieved"); *id.* at 11a n.8 ("While this appeal was pending, Mr. Cooper moved out of Manchester and into a nursing home in West Hartford, Connecticut. Because the move created potential jurisdictional problems, this Court's June 18, 2008 order allowed other Manchester residents to intervene as appellees"). Yet the court inexplicably directed its jurisdictional standing evaluation exclusively to *Cooper's* status as it existed *prior to* his permanent departure from town. And notably, the court presented its conclusion as to Mr. Cooper's viable standing as a *past*, not a current, condition. App. 4a ("[w]e conclude that Cooper *had* standing to raise an Establishment Clause challenge") (emphasis added); App. 18a (court found complaint allegations authorized standing).

2. Government classification of church speech

In addressing the merits of the case, the Second Circuit—like the district court—did not analyze the question of the private-versus-governmental status of the church's speech through First Amendment jurisprudence, but instead through the different standards of the state-action case law. The Second Circuit first found that "the CPU contract here is not enough by itself to make SYI a state actor[,]" relying on this Court's decision in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). App. 21a. But the court did find the church to be "a state actor" under the alternative standard of the "public function" test. App. 22a. The district court's detailed, contrary analysis notwithstanding (and not acknowledged), the Second Circuit perfunctorily announced that the contract functions carried out at the church's CPU

are part of the postal monopoly. The court therefore concluded that the church's contract performance action is properly classified as federal government action. *Id.*

Having assigned federal government status to the church's postal sales endeavor, the court extended that government status also to the church's speech in the immediate area of the sales counter. The court justified this by announcing that its *function*-based conclusion on government status carried a *spatial* implication: the "areas where the business of the CPU is conducted" were also adjudged to be governmental. App. 23a. The court did not explain why the church's speech found in that space must be classified as that of the federal government.

3. Establishment Clause analysis

Having classified the church's speech found in proximity to where SYI carries out its functions under the CPU contract as federal government speech, the Second Circuit proceeded to apply the *Lemon* test to it. App. 27a-29a. The court stated: "The express and admitted purpose of the religious material is to raise awareness for the mission sponsored by the Church and to spread the Church's Christian message. We have no trouble concluding that the displays on the postal counter soliciting prayer requests and advertising the mission express a distinctly religious purpose, and that they fail spectacularly under the first inquiry of *Lemon*." *Id.* at 27a.

Having found that the church violated the first prong of *Lemon*, the Second Circuit explained it need go no further in its establishment clause inquiry. *Id.* However, the court paused to state that the presence of the Postal Service's disclaimer on the transaction counter (which recites that the Postal Service's does not endorse the church's posted messages) complicates the court's (already concluded) analysis. App. 27a. But the court opined that relevant case law is not decisive as to the legal utility of disclaimers as a category, so the court stated that the Postal Service's particular disclaimer is ineffective.[3] App. 29a. In support of that conclusion, the court relied on this Court's decision in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), which, unlike Respondents' case, did not involve a government disclaimer. App. 27a-28a.

The Second Circuit found the district court's injunction requiring removal from the CPU of all of the church's speech about its ministries to be overbroad. App. 31a. The panel instead required that the immediate vicinity of the transaction counter be rid of the church's speech about its ministries, and that visual cues be erected that divide the transaction area from the rest of the facility. App. 31a-32a.

4. Stay of Second Circuit mandate

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[3] The court in its subsequent remedy discussion changed course and attributed effectiveness to the disclaimer, stating that the disclaimer should stay on the transaction counter for it is "helpful in differentiating the public space and function from the private one[.]" App. 31a.

Upon motion by the church, the Second Circuit on September 17, 2009, granted a stay in the issuance of its mandate, pending the church's petition for certiorari.

REASONS FOR GRANTING THE WRIT

The Second Circuit's decision authorizing plaintiffs' standing conflicts with this Court's holdings in *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464 (1982), and *Allen v. Wright*, 468 U.S. 737 (1984), and implies the irrelevance of Article III's concrete injury requirement to Establishment Clause claimants. The court of appeals' explicit validation of psychological discomfort as grounds for standing was joined by the court's implicit ruling that mootness is not a bar to Establishment Clause claims, and that mere partisanship without injury is adequate grounds to invoke federal court intervention in such cases.

The court's classification of the church's speech as that of the federal government is unprecedented in method and conclusion, and in both respects perilous to First Amendment values. In effect, the court of appeals erased the critical distinction between private and government speech. The court refused to follow this Court's carefully constructed standards defining that crucial division, and as a result attributed no significance to the undisputed facts about either the church's lone participation in its speech, or the context of its presentation. Having so departed from both the law and facts in its classification of the church's speech, it was with an

ironic consistency that the court of appeals applied the *Lemon* test to limn the church's purposes for its own speech, and to condemn them as religious.

This Court should grant review.

I. RESPONDENTS DO NOT HAVE STANDING TO SEEK RELIEF AGAINST THE CHURCH.

Respondent Cooper's assertion of "uncomfortable observer" standing must fail under Article III. *Infra* §I(A). In any event, Cooper's case while on appeal has become moot. *Infra* §I(B). Moreover, Respondents who intervened at the court of appeals on grounds that they "object" to the church's speech have failed to present an injury cognizable under Article III. §I (C).

A. The Second Circuit's holding that "feeling uncomfortable" constitutes an injury giving rise to standing under Article III conflicts with this Court's decisions.

The recognition in Establishment Clause cases of "offended observer" standing has never been validated by this Court. Indeed, the suppositions entailed in classifying psychological unease as an Article III injury in Establishment Clause cases are starkly at odds with several principles of this Court's standing jurisprudence. Yet the anomalous "offended observer" theory of federal court jurisdiction flourishes in the lower courts. *See, e.g.*, *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1252-53 (9th Cir. 2007) (standing for plaintiff offended by redesign of city's seal); *O'Connor v. Washburn Univ.*,

416 F.3d 1216, 1222-23 (10th Cir. 2005) (standing for plaintiff having unwelcome contact with a statue); *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir. 2005) (standing for plaintiff deeply bothered by religious display); *ACLU Nebraska Foundation v. City of Plattsmouth*, 358 F.3d 1020, 1030 (8th Cir. 2004) (standing for plaintiffs offended when seeing a monument); *Freethought Soc'y* of *Greater Phila. v. Chester County*, 334 F.3d 247, 250, 255 n.3 (3d Cir. 2003) (standing for plaintiff bothered by courthouse Ten Commandments plaque); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) (standing for plaintiffs worried they might see a monument unwelcome to them); *Suhre v. Haywood County*, 131 F.3d 1083, 1086-89 (4th Cir. 1997) (standing for plaintiff feeling revulsion over courtroom display); *Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679, 681 (6th Cir. 1994) (standing for plaintiff able to see a portrait unwelcome to him); *Murray v. City of Austin*, 947 F.2d 147, 150-51 (5th Cir. 1991) (standing for plaintiff offended by cross in coat of arms on city insignia); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (standing for plaintiff offended and intimidated by illustration of Mormon temple contained on portion of city logo); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989) (standing for plaintiff suffering mentally upon seeing a menorah on public property); *Saladin v. Milledgeville*, 812 F.2d 687, 691-92 (11th Cir. 1987) (standing for plaintiffs affronted by word on city seal); *Hawley v. City of Cleveland*, 773 F.2d 736, 739-40 (6th Cir. 1985) (standing for plaintiffs not enjoying their use of airport because a chapel was on the premises).

The Second Circuit's decision ratifying the standing of Mr. Cooper because he felt "very uncomfortable" upon viewing the church's speech in its CPU facility is merely another manifestation of the settled practice in the lower courts to authorize Establishment Clause claimants, uniquely, to seek injunctions against what bothers them.

1. Federal courts are not to serve as forums for the airing of grievances by concerned bystanders.

This Court has identified that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)). Defining that jurisdictional limitation is the "irreducible constitutional minimum of standing" under Article III, which includes a requirement that a plaintiff have suffered an "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Such injury must be "distinct and palpable," and not one that is "abstract" or "conjectural." *Allen v. Wright*, 468 U.S. 737, 751 (1984) (citations omitted).

The requirement that a plaintiff suffer a concrete injury to qualify for standing under Article III both serves and is guided by the policy that disallows federal courts to function as easy-access venues for the airing of policy disputes. If the form of injury required for federal court access were mere dismay emanating from a would-be plaintiff's

disagreement with a particular state of affairs, the courts would be converted into nothing more than "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 473 (1982). In such case, "the concept of 'standing' would be quite unnecessary." *Id.* This Court has disclaimed the idea that its function is to serve as a "national classroom on 'the meaning of rights' for the benefit of interested litigants," *id.* at 476 n.13, or as "'a forum in which to air . . . generalized grievances about the conduct of government.'" *Id.* at 483 (quoting *Flast v. Cohen*, 392 U.S. 83, 106 (1968)). The idea that the business of the federal courts is to correct constitutional errors at large "has no place in our constitutional scheme," *id.* at 489, and for federal courts to cooperate in such a role "open[s] the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 222 (1974).

Accordingly, any proposed standard of Article III injury—such as "feeling uncomfortable" about a passive religious display—that effectively authorizes the form of courthouse access that this Court has denounced, must be rejected.

2. "Feeling uncomfortable" is nothing other than the psychological consequence of observing conduct with which one disagrees, a consequence that this Court has identified as insufficient to constitute injury for standing under Article III.

In *Valley Forge*, this Court settled that "the psychological consequence presumably produced by an observation of conduct with which one disagrees" does not constitute "injury sufficient to confer standing under Art. III[.]" 454 U.S. at 485. This holding surely is not vocabulary-dependent. Offended observance as such is insufficient whether labeled as "offense," "dismay," "discomfort," "alienation," "annoyance," or any other comparable term. The federal courts do not serve to vindicate the value interests of "concerned" bystanders. *Id.* at 473. The pleading device of labeling a concerned bystander as an "uncomfortable" or "offended" observer should make no difference to the status of that person's claim under Article III. Otherwise "anyone could [then] contest any public policy or action he disliked." *Books v. Elkhart Co., Ind.*, 401 F.3d 857, 870 (7th Cir. 2005) (Easterbrook, J., dissenting).

Those persons with particularly intense commitment to legal and policy positions that are contradicted by government pursuits may be expected to identify correspondingly greater psychological discomfort upon observing the contested government action, as they mentally

rehearse its departure from their firm convictions. But this Court has explained that the sincerity and motivation of a party's convictions are of no moment to the standing evaluation. *Schlesinger*, 418 U.S. at 225-26. Neither should be the inevitable psychological accompaniment of those convictions. A subjective report of psychic offense allegedly resulting from one's awareness of a disfavored circumstance cannot be a judicially cognizable injury so long as "injury" is to serve as a limitation on federal court access.

In *Allen v. Wright*, 468 U.S. 737 (1984), this Court ruled that the plaintiffs who brought an equal protection challenge to the IRS's tax-exemption policy benefiting allegedly racially discriminatory schools, and who as a result of awareness of that policy suffered from a sense of racial stigmatization, did not have standing to bring their claim. Rather, only those who were "personally denied equal treatment under the challenged policy had standing to sue." *Id.* at 755. So here, Mr. Cooper was not subject to discriminatory treatment or restraint at the church's postal unit. He enjoyed the same access to and benefits of the Sincerely Yours, Inc. CPU that were extended to all members of the public. His discomfort over his awareness of the church's wall-hangings does not authorize a federal case.

The widespread disregard of *Allen v. Wright* by lower courts when considering Establishment Clause claims is a product of their identification of Establishment Clause cases as exempt from the ordinary rules of Article III standing. *See, e.g.*, *Trunk v. City of San Diego*, 568 F. Supp. 2d 1199,

1205 (S.D. Cal. 2008) ("If [merely ideologically offended] Plaintiffs' claims were based on any theory other than violation of the Establishment Clause, they would likely be out of court for lack of standing"); *In re Navy Chaplaincy*, 534 F.3d 756, 765 (D.C. Cir. 2008) ("the distinct context of the religious display and prayer cases" may uniquely allow for "abstract offense" as basis for standing). However, that view departs from this Court's clear instruction to the contrary. "[T]here is absolutely no basis for making the Article III inquiry turn on the source of the asserted right." *Lujan*, 504 U.S. at 576. *See also Valley Forge*, 454 U.S. at 484 ("we know of no principled basis on which to create a hierarchy of constitutional values or a complementary 'sliding scale' of standing which might permit respondents to invoke the judicial power of the United States").

3. This Court's decision in *Schempp* does not authorize standing for those who report psychic discomfort upon observing a passive religious display.

The *Valley Forge* Court's carefully explained disqualification of psychological discomfort as a harm cognizable under Article III illumines the Court's explanation for the standing of plaintiffs in *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). *See Valley Forge*, 454 U.S. at 486 n.22. Yet lower courts have unaccountably interpreted *Schempp*, and *Valley Forge*'s description of the *Schempp* plaintiffs ("impressionable schoolchildren subjected to unwelcome religious exercises," *Valley Forge*, 454 U.S. at 486 n. 22), as authorizing

standing for persons offended by mere observation of, or awareness of, a passive religious display—precisely the sort of abstract injury that *Valley Forge* excludes from Article III cognizance.[4]

The unique context of *Schempp* explains the plaintiffs' standing in that case: schoolchildren were coerced via compulsory attendance laws to attend a religious exercise as captive audience members, while constrained by the established rules of the classroom to give respectful attention to the presentation. *See Schempp*, 374 U.S. at 206-08, 210-11. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Students in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure") (internal citations omitted). The unique schoolroom context of *Schempp* is worlds apart from, for instance, Respondents' mere observation or awareness of the church's passive displays in the non-coercive setting of the CPU. "Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech." *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 664 (1989) (Kennedy, J., concurring in part and dissenting in part).

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[4] *See, e.g.*, cases discussed *infra* at 23.

Yet the Fourth Circuit has construed *Schempp* to validate Article III standing for any plaintiffs having "personal contact with state-sponsored religious symbolism." *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997).[5] The Seventh Circuit interpreted *Schempp* to validate standing for plaintiffs suffering as "the involuntary audience for a display." *American Civil Liberties Union of Illinois v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986). The Eleventh Circuit professed inability to identify any "qualitative differences" between the injury suffered by the *Schempp* students and that endured by persons who were made aware through anonymous phone calls and media reports that a cross stood in a state park about 100 miles away from them, provoking their unwillingness to recreate in that park. *ACLU of Georgia v. Rabun Co. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1107-08 (11th Cir. 1982). Another court summarized *Schempp*'s rule as follows: "'unwelcome' direct contact with the offensive object is enough to establish injury for purposes of standing." *Harvey v. Cobb County, Ga.*, 811 F.Supp. 669, 674 (N.D. Ga. 1993), aff'd 15 F.3d 1097 (11th Cir. 1994). The effect of such interpretations of *Schempp* by the lower courts has been their disregard of this Court's instruction in *Valley Forge* on Article III's concrete injury requirements.

While *Valley Forge* and *Allen* make clear that psychic offense does not constitute the concrete

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[5] That court asserted that the distinction between the standing determinations in *Schempp* and *Valley Forge* turned merely on the "proximity of the plaintiffs to the conduct they challenged." *Id.* at 1087.

injury required for standing under Article III, the broad disregard of that standard in Establishment Clause cases by lower courts, including the court below, presents cause for this Court to reinforce and further clarify that constitutional standard.

B. Cooper's claim was moot at the time the Second Circuit ruled that his complaint allegations gave him standing.

Federal courts "do[] not sit to decide arguments after events have put them to rest." *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 433 (1952). Since the time that Respondent Cooper moved out of Manchester and, as a result, no longer seeks postal services there, his lawsuit seeking an injunction against the church and the Postal Service has been moot. The Second Circuit erred in considering the status of Cooper's standing as it existed *prior to* his move from Manchester, for the court was required to evaluate—after Cooper's departure—the *current* status of its jurisdiction over the appeal in this case. "[A]n actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (internal quotation marks omitted) (case against State employer moot after plaintiff resigned from government employ and obtained private sector employment). *See also Bunting v. Mellen*, 541 U.S. 1019 (2004) (case moot on appeal after plaintiffs graduated from military institute whose policies they challenged, and defendant left employ of same); *Doremus*, 342 U.S. 429 (case moot when student

graduated from school about which lawsuit complained).

During briefing of the merits of the appeal below, counsel for Cooper notified the court of newly-discovered facts demonstrating that Cooper's case was moot. *Memorandum in Support of Motion to Intervene* (filed with Second Circuit by proposed intervenors on April 30, 2008) at 1, 6, 7; attached Declaration of Kevin M. Smith at ¶ 4. Because Cooper had suffered a broken hip and other declines in health, he was confined to a nursing home in another town, and there was no realistic expectation that he would return to Manchester to shop for postal products. *Id.* Having notified the court of appeals of Cooper's change in condition, his counsel acknowledged that governing Second Circuit case law called for dismissal of his case on mootness grounds. *Id.* at 7 n.5. But counsel urged that their proposed intervenor plaintiffs were capable of stepping into Cooper's shoes to defend the judgment on appeal. *Id.*

Counsel for Cooper submitted to the Second Circuit that "[w]hile it is conceivable that [Cooper] could visit the SYI CPU in the future, there is no realistic expectation that he will do so." *Id.* at 6. Yes, in theory Cooper might someday depart from the nursing home and travel to Manchester in pursuit of postal products; but such hypothetical speculation is not adequate to overcome mootness. "[S]uch speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide, in the absence of evidence that this is a product of immediacy and reality." *DeFunis*

v. Odegaard, 416 U.S. 312, 318 n.5 (1974) (internal quotation marks omitted). As this Court explained in *Lujan*, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." 504 U.S. at 564.

Because Cooper's case had become moot by the time the Second Circuit heard it, that court should have vacated the decision below and ordered the case dismissed. *Infra* §I(D).

C. Intervenor Respondents lack standing for they have not testified to having suffered any harm from the church's speech, and such harm may not be inferred by a court.

The intervenor plaintiffs cannot remedy the lack of standing. Their asserted injury is, if anything, even weaker. These proxy plaintiffs have failed to state that they have sustained an injury—even an abstract, psychological one—from their awareness of the church's speech in the Sincerely Yours, Inc. CPU. Instead, they have merely stated that they "object" to the presence of that speech. The intervenors' bypass of the perfunctory assertion of "offense" has placed them even outside the indulgent boundary line of the lower courts' lax standard—which requires at least a formalistic announcement of some form of chagrin.

The declarations of the intervening plaintiffs-appellees each present an identical statement about

their interest in the case. That statement reads as follows:

> I regularly patronize the "Sincerely Yours, Inc." contract postal unit to obtain U.S. Postal Service products and services, and *I object* to the religious symbols and practices that I encounter on display there.

Declaration of Gary Chipman, ¶3, *Declaration of Kimon N. Karath*, ¶3, *Declaration of Leslie Strong*, ¶3 (foregoing declarations appended to motion of proposed intervenors filed with Second Circuit on April 30, 2008) (emphasis added).[6] Each of the intervenors also explained that "I wish to intervene for the sole purpose of defending on appeal the district court's judgment[.]" *Id.* at ¶5, respectively.

Intervening parties are not authorized to "step into the shoes of the original party" on appeal, unless those intervenors independently fulfill Article III standing requirements. *Arizonans for Official English*, 520 U.S. at 64-65. "Concerned bystanders" seeking to sustain appellate review "as a vehicle for the vindication of value interests" are not constitutionally authorized to do so. *Id.*

A plaintiff bears the burden of proving facts showing the injury that is prerequisite to standing. *Lujan*, 504 U.S. at 561.

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[6] Counsel for Intervenors gave notice to the Second Circuit in post-hearing briefing that Intervenor Gary Chipman has moved from Manchester to Suffield, Connecticut. *Letter brief of Appellees*, filed April 3, 2009, at 2, n 2. It therefore appears that Mr. Chipman's claim would be moot, as well.

> Since [the components of the standing evaluation] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Id. Thus, a court may not *infer* an injury that a plaintiff has not alleged or proved. Presenting evidence of injury is plaintiffs' unavoidable obligation.

> It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record. And it is the burden of the party who seeks the exercise of jurisdiction in his favor, clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute. Thus, petitioners in [a] case must allege . . . facts essential to show jurisdiction. If [they] fail[] to make the necessary allegations, [they have] no standing.

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal citations and quotation marks omitted). As then-judge Alito observed in *ACLU-NJ v. Township of Wall*, 246 F.3d 258, 266 (3d Cir. 2001),

> While we assume that the [plaintiffs] disagreed with the [religious] display for some reason, we cannot assume that the [plaintiffs] suffered the type of injury that would confer standing. . . . Mere assumption would not satisfy the plaintiffs' burden to prove an element of their cause of action at this stage of the litigation and it cannot satisfy their burden to prove standing.

See also Doe v. Tangipahoa Parish School Bd., 494 F.3d 494, 498 (2007) (en banc) ("[w]ithout the requisite specifics, this court would be speculating upon the facts. This is something we cannot do, particularly in the standing context, where the facts must be proven, not merely asserted or inferred").

The intervenor Respondents have failed to assert an injury. Their meager testimony is limited to announcing themselves to be partisans ("I object") willing to take up Cooper's cause. Their failure to present specific evidence of injury automatically forecloses their standing.

D. This Court should vacate the decision below under *Munsingwear*, or else hold this case pending the outcome of *Salazar v. Buono* or *Boy Scouts of America v. Barnes-Wallace*.

Because Cooper's case—if ever viable—became moot upon his confinement in a nursing home in another town, and because the intervening plaintiffs never had standing, "[t]he case had lost the essential elements of a justiciable controversy and should not

have been retained for adjudication on the merits by the Court of Appeals." *Arizonans for Official English*, 520 U.S. at 48. In such instance, "[t]he established practice. . . in the federal system. . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *Id.* at 71, quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950) (internal quotation marks omitted). This practice of vacatur serves the cause of equity by "eliminating a judgment the loser was stopped from opposing on direct review." *Id.* at 71, citing *Munsingwear*, 340 U.S. at 40.

Alternatively, this Court could hold this case pending its resolution of *Salazar v. Buono*, 129 S.Ct. 1313 (2009) (*certiorari* granted) (argued October 7, 2009), or *Boy Scouts of America v. Barnes-Wallace*, U.S. No. 08-1222 (March 31, 2009) (*certiorari* pending), either of which may clarify the status of "offended observer" or "objecting plaintiff" standing. This Court could then grant this petition for certiorari, vacate the court of appeals' judgment, and remand for further consideration in light of this Court's holding in the relevant case.

II. THE CHURCH'S SPEECH DID NOT, AND CANNOT, VIOLATE THE ESTABLISHMENT CLAUSE.

The court below turned the First Amendment on its head. Never has this Court validated the counter-intuitive notion that the private religious speech of a religious institution presented on its own property is subject to classification as speech of the federal government and prohibited under the Establishment Clause. The lower court's

unprecedented ruling was the product of a series of cumulative analytical missteps.

The court below could not, through an assessment of the church's speech itself, plausibly categorize that speech—presented in the church's own name, about its own ministries, in its own facility, without any government participation in its presentation—as the speech of the federal government. So the court classified a *different* endeavor (Sincerely Yours, Inc.'s contracted postal sales) as governmental, and then extended that government classification to the church's speech—though that speech was not a component of the commercial transactions deemed governmental. Having imputed that government status to the church's speech, the court woodenly kept course to apply the *Lemon* test to the church, notwithstanding the patently counterfactual nature of deploying *Lemon* to analyze a church's purposes for speaking about its own ministries. Predictably, the court concluded that the church is religious, and therefore violates *Lemon*.

That anomalous method and conclusion calls for this Court's review.

A. The Court of Appeals erred in classifying the church's speech as the government's speech.

The Second Circuit's method of evaluating the status of the church's speech was flawed in two prominent respects. First, although plaintiffs present an Establishment Clause challenge to the

church's speech, the court did not apply the pertinent Establishment Clause case law. Instead, the court drew from "state action" case law in other fields.

Establishment Clause jurisprudence has a wealth of precedent on the precise question of what speech is attributable to the government. *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290, 302-310 (2000) (resolving the "crucial difference" between government and private speech at issue in the facts of that case); *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (resolving "whether . . . activities are 'governmental indoctrination' because they are supported directly and almost entirely by State funds"); *Capitol Square Review and Advisory Board v. Pinnette*, 515 U.S. 753 (1995) (resolving whether private religious display on government property is attributable to government); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993) (resolving whether government interpreter in private school interpreting Catholic doctrine should be classified as a governmental or private speaker); *Lee v. Weisman*, 505 U.S. at 587-88 (resolving whether a rabbi's prayer at a public high school graduation constituted government expression). The private-versus-governmental classification standards found in Establishment Clause case law are tailor-made to claims like the one here.[7] The Second Circuit erred by disregarding the instruction of those cases.

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[7] For instance, establishment clause jurisprudence includes as a premier classifying consideration the determinative role played by private decisionmaking in response to neutral government eligibility criteria. *See Agostini*, 521 U.S. at 226.

Secondly, the court of appeals violated even the standards contained within the non-Establishment Clause state action case law it employed. Those standards require a court to focus on the complained-of acts themselves—not other, unchallenged actions. As this Court affirmed in *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288 (2001), "[t]he judicial obligation is . . . to assure that constitutional standards are invoked 'when it can be said that the State is *responsible* for the *specific conduct of which the plaintiff complains.*'" *Id.* at 295 (citing *National Collegiate Athletic Association v. Tarkanian*, 488 U.S. 179, 191 (1988); *Blum* v. Yaretsky, 457 U.S. 991, 1004 (1982)) (latter emphasis added).

Yet the court of appeals evaluated for governmental status the uncontested postal sales transactions, determining these to comprise a "public function," thereby establishing a basis from which to extend to the church's *speech* a government classification that could never have derived from a direct evaluation of that speech itself. Such unthinking equation is precisely what state action case law forbids. *See Polk County v. Dodson*, 454 U.S. 312, 321-325 (1981) (defendant public defender, while a state actor for certain purposes, was not a

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"In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality*, upholding aid that is offered to a broad range of groups or person without regard to their religion." *Good News Club v. Milford Central School*, 533 U.S. 98, 114 (2001) (emphasis and brackets in original; internal quotation marks omitted).

state actor for the particular purpose challenged by plaintiff).

The court of appeals' approach is repudiated in the relevant Speech Clause context as well. In *Johanns v. Livestock Marketing Association*, 544 U.S. 550 (2005), this Court addressed the question—like that presented here—whether the challenged speech belonged to the federal government or a private party, and this Court engaged a factual assessment directed to the speech itself. This Court reached its determination by identifying who initiated, designed, and controlled the presentation of that speech. *Id.* at 560-62. Here, obviously, it was the church, not the USPS, that controlled the speech from start to finish.

After the Second Circuit classified the postal contract sales as governmental, the court held that the church's speech found in *close proximity to* the postal sale transactions it had deemed governmental was *itself* governmental. Its explanation for that extension was both arbitrary and incomplete.

First, the court conflated function and space. The court ruled that the CPU postal transactions constitute a "public function," but did not restrict the resulting government status to the *activity* that comprises that "public function" (i.e., the postal transactions). Rather, the court extended the federal government classification to the "areas" where the putative public function is carried out—a spatial conclusion that does not follow from its functional evaluation. App. 23a.

But even if the court's government classification of the *space* near the transaction counter could be justified, its federal government classification of the church's *speech* remains unexplained. For private speech in "government space" does not necessarily become the government's speech. *See, e.g., Good News Club*, 533 U.S. 98 (Christian student club meetings in government school facility are private speech); *Capitol Square Review and Advisory Board*, 515 U.S. 753 (privately-placed religious symbol on government property constitutes private speech). The court of appeals' analysis here, as well, departs from important standards of First Amendment concern.

B. The *Lemon* test is not designed to investigate what is not governmental.

Having classified part of the church's speech as that of the federal government, the Second Circuit mechanistically proceeded to apply the *Lemon* test to the church. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). But the court of appeals went beyond merely carrying forward the error of its preceding governmental classification of the church's speech; the court erred anew in its application of *Lemon* itself. For the court applied *Lemon*'s first prong to evaluate the church's "purpose" for something other than the activity upon which the court had rested its governmental classification of the church. That is, the court did not evaluate the church's purpose for its *postal transactions* (the activity the court deemed a "public function"), but rather the church's purpose for its *speech* found near that activity (which was *not*

deemed a public function, but merely held to be *derivatively*—not by its own lights—governmental).

Had the court all along evaluated the church's speech itself instead of its postal transactions, the court could never have classified that speech as governmental in the first place. But even having done so, had the court remained consistent and evaluated the church's purpose for its postal sales instead of for its speech, the court could not have credibly identified a *Lemon* violation.

Never has this Court ratified anything like the outcome reached by the court below. "More than once [has this Court] rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995). The unimpeachable Postal Service standards that leave uniformly unregulated all private speech by CPU operators on their own properties present no constitutional defect, nor does the self-generated speech of those private contractors. The problematic maneuvers required of the Second Circuit to achieve its result only further emphasize the departure of its ruling from constitutional standards.

If not corrected, the decision below leaves at risk the rights of those innumerable private religious speakers whose expression arises in the context of a contract or other mutually beneficial relationship with the government.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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November 17, 2009

APPENDIX

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BERTRAM COOPER,

Plaintiff-Appellee,

v.

U.S. POSTAL SERVICE, JOHN E. POTTER, as Postmaster General, RONALD G. BOYNE, as Postmaster, Manchester, Connecticut Post Office,

Defendants-Appellants,

FULL GOSPEL INTERDENOMINATIONAL CHURCH INC., DR. PHILIP SAUNDERS HERITAGE ASSOCIATION, INC., SINCERELY YOURS INC.,

Intervenors-Defendants-Appellants,

GARY CHIPMAN, KIMON KARATH, LESLIE STRONG,

Intervenors.

No. 07-4825

No. 07-4826

Appeal from the United States District Court for the District of Connecticut.
No. 3:03-cv-01694– Dominic Squatrito, District Judge.

Argued: March 20, 2009.
Decided and Filed: August 20, 2009

Before: JACOBS, Chief Judge WESLEY, Circuit Judge, and CROTTY*, District Judge.

This case raises an Establishment Clause challenge to religious displays at a contract postal unit operated by a church in Manchester, Connecticut. Contract postal units, or "CPUs," are postal facilities operated by private entities on private property (such as general stores or private homes) pursuant to contracts with the United States Postal Service. Plaintiff Bertram Cooper ("Cooper"), a Manchester resident, alleged discomfort with encountering religious materials displayed at the Manchester CPU and sued the United States Postal Service ("USPS"), the Postmaster General of the United States (John E. Potter ("Potter")), and the Postmaster of Manchester, Connecticut (Ronald G. Boyne ("Boyne")) for declaratory and injunctive relief. The Full Gospel Interdenominational Church (the "Church"), which operates the CPU pursuant to a revenue-sharing contract with the United States government, intervened as a Defendant.[1]

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* The Honorable Paul A. Crotty of the United States District Court for the Southern District of New York, sitting by designation.

[1] The term "Church" refers collectively to the intervenor-defendants who consist of: (1) the Full Gospel Interdenominational Church; (2) the "Dr. Phillip Saunders Heritage Association" (a Connecticut not-for-profit created by the Church to hold and manage its real estate); and (3)

The Manchester CPU is a purpose-built storefront with postal facilities on one side and the Church's outreach and ministry efforts on the other, with some spillover.

On cross-motions for summary judgment, the U.S. District Court for the District of Connecticut (Squatrito, *J.*) initially decided that the religious displays at the CPU violated the Establishment Clause, ordered removal of the religious displays from the premises, and issued a permanent injunction preventing the Church-and proprietors of other CPUs-from displaying religious materials in contract postal units. On a motion to amend the judgment, the district court concluded that Cooper lacked standing to challenge Postal Service policies as to other CPUs and the decision was amended to apply only to the Manchester CPU. The injunction is stayed pending this appeal.

On appeal, the Church argues that the grant of partial summary judgment to Cooper was error because the displays: (i) were erected without involvement or encouragement by the USPS, (ii) do not violate regulations governing the appearance of CPUs, and (iii) constitute private speech.

Cooper, in turn, contends that the CPU is a state actor because (i) the USPS delegated to it an exclusively public function and (ii) the extensive and detailed contracts which accompany participation in the CPU program sufficiently involve the state in the CPU's activities. Cooper argues that as state action, the religious displays violate the Establishment

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Sincerely Yours, Inc. (the not-for-profit entity incorporated to operate the CPU).

Clause. Cooper stopped using the CPU when he entered a nursing home, but the suit has continued on behalf of three intervenors who are similarly aggrieved.

We now affirm in part and reverse in part. We conclude that Cooper had standing to raise an Establishment Clause challenge and that an Establishment Clause violation occurred at the Manchester CPU, but that any such violation is limited to the area of the CPU performing the public function; all other areas of the CPU remain the province of the private entity. Accordingly, by way of remedy, we require that the postal counter be free of religious material, and that visual cues distinguish the space operating as a postal facility from the space functioning as the private property of the Church.

I

(A) The Post Office

Article I, Section 8 of the Constitution provides that "Congress shall have power ... [t]o establish Post Offices and post Roads." Congress has delegated the power to create Post Offices to the USPS, 39 U.S.C. § 404(a)(3), awarded the USPS a monopoly over the carriage of letter mail, *see* Private Express Statutes, 18 U.S.C. §§ 1693-1699; *Air Courier Conf. of Am. v. Am. Postal Workers Union AFL-CIO*, 498 U.S. 517, 519, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991), and forbidden the establishment of post offices without authority from the Postal Service, 18 U.S.C. § 1729.[2] Congress has also directed the Postal

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[2] Services like UPS and Federal Express operate pursuant to an exception to the monopoly which allows private carriers to

Service to "serve as nearly as practicable the entire population of the United States." 39 U.S.C. § 403(a). That directive includes "establish[ing] and maintain[ing] postal facilities of such character and in such locations, that postal patrons throughout the Nation will, consistent with reasonable economies of postal operations, have ready access to essential postal services." 39 U.S.C. § 403(b)(3). This entails "a maximum degree of effective and regular postal services to rural areas, communities, and small towns [even] where post offices are not self-sustaining." 39 U.S.C. § 101(b).

(B) CPUs

In order to comply with the Congressional mandate, the USPS uses both traditional post offices (or "classified" post offices) as well as CPUs, postal facilities operated by private parties on private property pursuant to revenue-sharing contracts with the government. The CPUs furnish postal services to places where it is not otherwise geographically or economically feasible to build and operate official "classified" post offices. Originally called "contract stations," CPUs have been used by the Postal Service since the 1880s.[3]

The "Glossary of Postal Terms" defines a CPU as:

> A postal unit that is a subordinate unit within the service area of a main post office.

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provide services for "extremely urgent letters." *See* 39 C.F.R. § 320.6.

[3] *See* USPS Postal History, Post Offices and Facilities, Stations and Branches, available at: http://www.usps.com/postalhistory/_rtf/StationsBranches.rtf.

> It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, postal money order or registered mail)....

United States Postal Service Glossary of Postal Terms, Publication 32, May 1997 (Updated With Revisions Through July 5, 2007) at 27.[4] Five thousand CPUs across the country are in locations as diverse as private homes, gas stations, seminaries, groceries, gift shops, and hardware stores. See Defendants' Statement Pursuant to Local Rule 56 of the Southern District of New York ("Local Rule 56(a)1 Statement"), ¶ 6, December 27, 2004; Postal Accountability and Enhancement Act § 302 Network Plan, June 2008, at 42-43.[5] Several are operated by faith-based entities. *See* Defendants' Local Rule 56(a)1 Statement, ¶ 16.

(C) Postal Regulations

According to postal regulations, a CPU "must not be located in, or directly connected to, a room where intoxicating beverages are sold for consumption on the premises." Standard Operating Procedures for Contract Postal Units. Beyond that, instruction is provided by the Contract Postal Unit Operations Guide, a training and operations manual for proprietors of CPUs:

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[4] The Glossary is available at: http://www.usps.com/cpim/ftp/pubs/pub32.pdf

[5] The Network Plan is available at: http://www.usps.com/postallaw/_pdf/PostalServiceNetworkPlan.pdf#search='post offices cpu'.

The appearance of your [CPU] reflects not only on you as a businessperson, but also on the Postal Service. Your unit should be organized and clean, conveying a professional image to your customers. It is very important to the success of your unit that our customers can recognize you as an official United States Post Office contract unit. The Postal Service has dedicated exterior and interior signage that will help you establish this identity.

CPUs are regulated by these few guidelines, which are mainly words of encouragement. Classified post offices, on the other hand, are governed by exacting regulations. Among them are limitations on the presence of religious displays, messages and symbols. For example, the Postal Operations Manual ("POM") provides that "[e]xcept for official postal and other governmental notices and announcements, no handbills, flyers, pamphlets, signs, posters, placards, or other literature may be deposited on the grounds, walks, driveways, parking and maneuvering areas; exteriors of buildings and other structures; or on the floors, walks, stairs, racks, counters, desks, writing tables, window ledges, or furnishings in interior public areas on postal premises [of classified post offices]." POM § 124.55.[6] "Bulletin boards and other posting space in Post Office lobbies and other public access areas may not be used for posting or display of ... [r]eligious symbols...." *Id.* Seasonal holiday displays are tightly

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[6] This section of the POM is available at: http://www.nalc.org/depart/cau/pdf/manuals/POM/pomc1.pdf.

regulated (as set out in the margin [7]). No such regulations govern CPUs.

(D) The Manchester CPU

For more than 15 years, the Postal Service has relied on CPUs to supplement postal service in Manchester, Connecticut. Prior to 2001, the CPU was located in the "Community Place," an outreach organization. When Community Place suspended operation in 2001, the USPS solicited bids. There were two bidders: Manchester Hardware, Inc., and the Full Gospel Interdenominational Church. The Postal Service assigned scores to each based on location, premises, and ability to provide services. The Church earned a suitability score of "97" to Manchester Hardware's "91," and the CPU contract was awarded to the Church on November 21, 2001. The Church then incorporated a not-for-profit business, Sincerely Yours, Inc. ("SYI"), for the purpose of operating the CPU. The sole business of SYI is the operation of the CPU; other than offering USPS products and services, it serves no commercial function.

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[7] a. [Seasonal] Displays should relate to the business of the Postal Service, such as promoting the use of postal products and services and encouraging customers to send greetings and gifts.

b. *The Postal Service must avoid the appearance of favoring any particular religion or religion itself.*

c. Symbols identified with a particular religion, including but not limited to nativity scenes, crosses, or the Star of David, shall not be displayed on postal property....

d. Printed expressions "Season's Greetings" and "Happy Holidays" should be used in lieu of "Merry Christmas" or "Happy Hannukkah."

POM § 124.57 (emphasis added); *see also* POM § 124.56.

The standard CPU contract requires that "all Contract Postal Units ... reflect a uniform image." For example, the contract specifies that "[a]mbient lighting shall be at least 80 footcandles anywhere at the service and/or work counter areas," and individual CPU owners/entities must "[c]learly indicate any [and] all deviations from [the] noted ... requirements on submitted drawings/documents so they may be evaluated along with the balance of the proposal." In order to achieve the desired "uniform image," the USPS-per the CPU contract-agrees to pay for (among other things) the construction of postal service counters and other build-out requirements, all according to detailed specifications. The USPS paid for the construction of such items at SYI.

All money collected at the CPU is the property of the Postal Service, and SYI is paid for its share of contractual earnings at the end of the relevant accounting period: 18% of sales of USPS products and services, and 33% of post office box rental fees. Employees of SYI are trained by the USPS, and "must be professionally attired, wear name tags, and project a favorable image of the supplier as the operator of the Contract Postal Unit," but SYI retains the authority to hire and fire all SYI employees.

The USPS "reserves the right, without prior notice, to conduct audits and customer surveys and to review and inspect the supplier's performance and the quality of service at any time during the operating hours of the [CPU]." The USPS also appoints a "Contracting Officer's Representative" (or "COR") as a liaison between the USPS and the CPU,

to ensure compliance with the CPU contract and governing regulations, and to provide general oversight. Defendant Ronald Boyne-the Manchester Postmaster (and a Church member)-was appointed to this position at SYI. At his deposition, he testified that one of his responsibilities was to ensure that SYI projected a "positive image" of the USPS and complied with all postal regulations. When asked to name items which would not present a "positive image" or were not permitted to be displayed or sold in a CPU, Boyne replied that through his COR training he learned that only two items were prohibited by regulation: alcohol and pornography.

As for the displays at the CPU, the contract states that SYI "will be posting advertisements for local nonprofit community outreach agencies such as MARC, Inc., Heart Association, Flu Clinics, Cancer Agencies, etc." Religious displays are not mentioned.

SYI opened in June 2002. It is located on Main Street in Manchester and is marked with various signs identifying it as the "Sincerely Yours, Inc. Contract Postal Unit." The exterior of the building (which faces the street) has one such sign along with the familiar eagle logo of the Postal Service.

The interior of the CPU contains (among other things) a postal counter manned by SYI employees, a waiting area for customers, post office boxes, and a shelving unit containing official USPS postal supplies, paperwork, and mailing boxes. SYI offers a variety of postal services including Express, Priority, and First Class domestic mail; international mail; insurance, certification, and delivery confirmation services; Post Office Box rentals; and sales of stamps, stationery, and other packaging products.

The prices for these products and services are set by the USPS.

(E) The Religious Displays

Also located in the CPU are religious materials: displays informing customers about prayer requests; prayer cards; a box-located on the postal counter-into which postal service customers can deposit prayer requests; a framed advertisement for "World-Wide Lighthouse Missions" (the missionary organization to which the SYI CPU's profits are donated); a donation box for the World-Wide organization; pamphlets and flyers advertising the mission, which include biblical passages and religious messages; a World-Wide Lighthouse Missions donation jar on the postal counter; a television monitor displaying Church-related videos on one side of the postal counter; various 8 1/2" x 14" photographs of Church events; and pictures of "Wally"-a cartoon character who conveys religious messages.

A sign in the middle of the postal counter bears the official USPS logo and a disclaimer:

The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit.

(F) Cooper's Objections to the CPU

Plaintiff Bertram Cooper is a 77-year-old (former) resident of Manchester, Connecticut.[8]

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[8] While this appeal was pending, Mr. Cooper moved out of Manchester and into a nursing home in West Hartford, Connecticut. Because the move created potential jurisdictional problems, this Court's June 18, 2008 order allowed other Manchester residents to intervene as appellees. They are Gary Chipman, Kimon Karath, and Leslie Strong.

Cooper used the SYI CPU because it was closer to his home than the next available post office. As Cooper's affidavit recounts, the religious displays at SYI made him "very uncomfortable," and when he registered a complaint, he "was told that [he] could go somewhere else if [he didn't] like it." The complaint alleges that he "reasonably perceive[d] SYI's religious expression to be governmentally-sponsored and supported religious activity."

(G) The Lawsuit

Cooper filed his complaint on October 3, 2003, seeking declaratory and injunctive relief against the USPS, the Postmaster General, and the Postmaster of Manchester, Connecticut. The Church intervened as a defendant. The district court's Memorandum and Order deciding the parties' cross-motions for summary judgment (issued April 18, 2007), concluded that:

> (1) for the purposes of First Amendment and Establishment Clause jurisprudence, the SYI CPU is a state actor;
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> (2) the contractual relationship between the USPS and the Church does not violate the Establishment Clause; and
>
> (3) the religious displays at the SYI CPU violate the Establishment Clause.

Initially, the District Court granted Cooper's request for a declaratory judgment covering all CPUs nationwide:

> To the extent that [SYI], and all other individuals or entities, in the course of operating [CPUs] ... act in a manner that proselytizes or advances religion, including,

> but not limited to, the posting of religious displays that proselytize or advance religion, such conduct violates the First Amendment to the United States Constitution.

On Cooper's request for an injunction, the district court directed that: (i) SYI remove all religious displays and "cease from acting in a manner that proselytizes or advances religion"; (ii) the USPS provide notice to all CPUs that "they shall not act in a manner that proselytizes or advances religion"; and (iii) the USPS institute adequate monitoring procedures to ensure compliance with the order.

Both the Postal Service and the Church moved to alter or amend the judgment. By order dated August 28, 2007, the district court rejected the Church's offer to cure the Establishment Clause violation by removing the two large signs and one small sign containing the words "United States Post Office," and by adding a sign indicating that SYI was a "private entity."

The Postal Service argued that the findings were insufficient to support relief against the USPS generally and to any CPU other than SYI. The district court amended its decision, commenting that it could "find[ ] nothing in the record indicating the Plaintiff has suffered a concrete and particularized injury that is either actual or imminent at any CPU other than the SYI CPU." The relief was narrowed accordingly.

All Defendants appealed, but the USPS dropped out, leaving the Church alone as Appellant.

II

Article III of the Constitution limits the judicial power of the United States to the resolution of cases and controversies. U.S. Const. art. III, § 2. This limitation is effectuated through the requirement of standing. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc. ("Valley Forge ")*, 454 U.S. 464, 471-72, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). "The question of standing is not subject to waiver ...: 'We are required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us.' " *United States v. Hays,* 515 U.S. 737, 742, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) (quoting *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 230-31, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990)). It is axiomatic that "[t]here are three Article III standing requirements: (1) the plaintiff must have suffered an injury-in-fact; (2) there must be a causal connection between the injury and the conduct at issue; and (3) the injury must be likely to be redressed by a favorable decision." *Kendall v. Employees Ret. Plan of Avon Prods.,* 561 F.3d 112, 118 (2d Cir.2009). The injury requirement is the linchpin in Establishment Clause cases: "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.' " *Valley Forge*,454 U.S. at 472, 102 S.Ct. 752 (quoting *Gladstone, Realtors v. Vill. of Bellwood,* 441 U.S. 91, 99, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). A demonstration of a "generalized grievance" is insufficient; the plaintiff must demonstrate a " 'distinct and palpable injury' ...

that is likely to be redressed if the requested relief is granted." *Id.* at 475, 102 S.Ct. 752 (quoting *Gladstone,* 441 U.S. at 100, 99 S.Ct. 1601).

Standing is often a tough question in the Establishment Clause context, where the injuries alleged are to the feelings alone.[9] This is often the case in religious display cases where the fact of exposure becomes the basis for injury and jurisdiction. As the Eighth Circuit has observed, "[n]o governing precedent describes the injury in fact required to establish standing in a religious display case...." *ACLU Nebraska Found. v. City of Plattsmouth,* 358 F.3d 1020, 1028 (8th Cir.2004).

Several times, the Supreme Court has considered the problem of standing in the Establishment Clause context, but so far the Court has announced no reliable and handy principles of analysis. For example, in *Valley Forge,* the Supreme Court concluded that plaintiffs lacked standing to bring their Establishment Clause claim challenging the conveyance, at no cost, of 77 acres of federal property to a Christian college. The Third Circuit had earlier concluded that the challengers "had standing merely as 'citizens,' claiming 'injury in fact' to their shared individuated right to a government that 'shall make no law respecting the establishment of religion.' " 454 U.S. at 470, 102 S.Ct. 752 (quoting

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[9] A broad swath of litigants can demonstrate standing under *Flast v. Cohen,* 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), which permits litigants to raise claims on the ground that their "tax money is being extracted and spent in violation of specific constitutional protections." *Id.* at 106. The issue is far ore difficult where, as here, the alleged injuries are non-economic and taxpayer status is not the basis for jurisdiction.

619 F.2d 252, 261 (3d Cir.1980)). But the Supreme Court reversed because:

> They fail[ed] to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms. It is evident that respondents are firmly committed to the constitutional principle of separation of church and State, but standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy. That concrete adverseness which sharpens the presentation of issues, is the anticipated consequence of proceedings commenced by one who has been injured in fact; it is not a permissible substitute for the showing of injury itself.

Valley Forge, 454 U.S. at 485-86, 102 S.Ct. 752 (quotations, citation, and emphasis omitted). This passage explains what standing is *not,* without saying what standing *is* in these kinds of cases. Lower courts are left to find a threshold for injury and determine somewhat arbitrarily whether that threshold has been reached. Chief Justice Rehnquist recognized that the question of standing in the Establishment Clause context is vexed: "[T]here are serious arguments on both sides of this question, the Courts of Appeals have divided on the issue, and the issue determines the reach of federal courts' power of

judicial review of state actions." *City of Edmond v. Robinson,* 517 U.S. 1201, 1203, 116 S.Ct. 1702, 134 L.Ed.2d 801 (1996) (dissenting in the denial of certiorari; joined by Justices Scalia and Thomas). In short, there is uncertainty concerning how to apply the injury in fact requirement in the Establishment Clause context.

Cooper alleged that the discomfort he suffered when he viewed the religious displays at SYI was so great that he was inclined to drive to another postal unit. The initial question is whether that amounts to a sufficiently "distinct and palpable" injury for standing purposes. Our leading case on Establishment Clause standing is *Sullivan v. Syracuse Housing Authority,* 962 F.2d 1101 (2d Cir.1992), in which the Syracuse Housing Authority (the "Authority") contracted for a faith-based entity to operate a religious after-school program in the community center of the public housing development where the plaintiff lived. The district court dismissed the case for lack of standing, but the Second Circuit found a cognizable "spiritual First Amendment injury" and reversed. *Id.* at 1108. The touchstone of the analysis was whether Sullivan had a "direct and personal stake" in the controversy. *Id.* Relying on *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), and *Valley Forge,* we concluded that the Authority's conduct deprived Sullivan of his right to use and enjoy the community center, that Sullivan "[found] the alleged establishment of religion offensive," and that the Authority's actions essentially established religion "in a place functionally analogous to Sullivan's own

home." *Sullivan*, 962 F.2d at 1108. [10] Under those circumstances, Sullivan's allegations amounted to a sufficiently "direct and personal stake" in the dispute to confer standing, and the case was reinstated and remanded to the district court.

Applying *Sullivan*, we must conclude that Cooper has alleged a sufficiently "direct and personal stake" in the controversy to confer standing. Cooper claims that he was made uncomfortable by direct contact with religious displays that were made a part of his experience using the postal facility nearest his home, and that upon complaint, he was advised to alter his behavior. Under *Sullivan*, these allegations state an injury in fact sufficient to support standing.

III

(A) State Action

The Due Process Clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. By its terms, "private action is immune from the restrictions of the Fourteenth Amendment," and the Amendment "offers no shield" against private conduct, " 'however discriminatory or wrongful.' " *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 92 L.Ed. 1161

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[10] Separately, the Circuit also concluded that Sullivan's status as a parent whose child had been taught religious songs in the after-school program gave him an additional, independent ground sufficient to support standing. *Sullivan*, 962 F.2d at 1109.

(1948)). The Amendment applies only to state action. *Id.; see also Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). The Fourteenth Amendment, in turn, incorporates the First Amendment, so "[t]he Fourteenth Amendment, and, through it, the First ... Amendment[ ], do not apply to private parties unless those parties are engaged in activity deemed to be 'state action.' " *Nat'l Broad. Co., Inc. v. Commc'ns Workers of Am., AFL-CIO*, 860 F.2d 1022, 1024 (11th Cir.1988).

"Actions of a private entity are attributable to the State if 'there is a sufficiently close nexus between the State and the challenged action of the ... entity so that the action of the latter may be fairly treated as that of the State itself.' " *United States v. Stein*,_541 F.3d 130, 146 (2d Cir.2008) (quoting *Jackson*, 419 U.S. at 351, 95 S.Ct. 449). The "close nexus" test " 'assure[s] that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.' " *Id.* at 146-47 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). However, "Supreme Court cases on this issue 'have not been a model of consistency.' " *Id.* at 147 (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991) (O'Connor, J., dissenting)). "Not surprisingly, therefore, there is no single test to identify state actions and state actors. Rather, there are a host of facts that can bear on the fairness of an attribution of a challenged action to the State." *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir.2004) (quotations and citations omitted).

"A nexus of state action exists ... when the state exercises coercive power, is entwined in the management or control of the private actor, ... or when the private actor operates as a willful participant in joint activity with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is entwined with governmental policies." *Stein,* 541 F.3d at 147 (quotations, citations, and emphases omitted). However, "conduct by a private entity is not fairly attributable to the state merely because the private entity is a business subject to extensive state regulation or 'affected with the public interest.'" *Cranley v. Nat'l Life Ins. Co. of Vermont,* 318 F.3d 105, 112 (2d Cir.2003) (quoting *Jackson,* 419 U.S. at 350, 95 S.Ct. 449). "A finding of state action may not be premised solely on the private entity's creation, funding, licensing, or regulation by the government." *Id.*

1. Government Contracts

SYI's contract with the government does not convert its conduct into state action. The government enters into contracts for all kinds of goods and services without converting its contractors into state actors; architects designing federal buildings or engineers building bridges do not thereby become government actors. *See Rendell-Baker v. Kohn,* 457 U.S. 830, 841, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982) (the "[a]cts of ... private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts"). The fact that "a private entity performs a function which serves the public does not make its acts state action." *Id.* at

842, 102 S.Ct. 2764. The contract itself is insufficient to render all of the contractor's conduct state action, and the CPU contract here is not enough by itself to make SYI a state actor. *See id.*

2. The "Public Function" Test

Since the contract alone does not convert the CPU into a state actor, we must explore whether and to what extent the CPU is a "state actor" while performing its contractual tasks. One way that a private entity may be considered a state actor for constitutional purposes is by "exercis[ing] powers that are 'traditionally the exclusive prerogative of the State.' " *Blum v. Yaretsky*, 457 U.S. 991, 1005, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (quoting *Jackson*, 419 U.S. at 353, 95 S.Ct. 449). "State action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity. For example, only the State may legitimately imprison individuals as punishment for the commission of crimes." *Horvath*, 362 F.3d at 151.

In *West v. Atkins*, the Supreme Court concluded that the conduct of a private medical doctor attending to prison inmates pursuant to a government contract was "fairly attributable to the State" for the purposes of 42 U.S.C. § 1983. 487 U.S. 42, 57, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988). [11] The approach is functional:

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[11] The inmate brought a § 1983 action against the doctor alleging an Eighth Amendment violation on the ground that the doctor failed to provide adequate treatment for an ankle injury.

> The fact that the State employed [the doctor] pursuant to a contractual arrangement that did not generate the same benefits or obligations applicable to other 'state employees' does not alter the [state action] analysis. It is the physician's *function* within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State.

Id. at 55-56, 108 S.Ct. 2250 (emphasis added). State action analysis is thus guided by the nature of the services supplied.

SYI is a state actor under this public function test. Congress granted to the USPS the exclusive duty to create and operate Post Offices with responsibility to accept and process mail, sell postal products, and, of course, participate in the safe carriage of mail. *See* 39 U.S.C. § 404(a)(3). As to safe carriage, Congress has conferred to the Postal Service a complete monopoly. *See, e.g.*, 18 U.S.C. § 1693. That monopoly entails the sale of postage for letters, acceptance of mail for transmission, and the marking and processing of mail for delivery: all functions performed by SYI and other CPUs. Accordingly, we conclude that SYI is a state actor under the public function test because it performs-at least in some parts of the facility-"activit[ies] that traditionally ha[ve] been the exclusive, or near exclusive, function of the State." *Horvath*, 362 F.3d at 151.

That is not to say, however, that *all* of SYI serves a public function, any more than selling shovels becomes a public function when a CPU is located in a hardware store. SYI is an independent,

separate and distinct not-for-profit entity incorporated for the Church's private use and purposes. The extent of state action correlates directly with the performance of the public function, which here is limited to those areas where the business of the CPU is conducted. This is so notwithstanding that signage at the portal identifies the shop (or home or seminary) as a place where federal postal services are rendered. In sum, SYI is a state actor pursuant to the public function test, but only as to those areas of its facility where the public function takes place, namely the postal counter, the postal boxes, and the shelving unit that stores and displays postal materials.

Having determined that at least part of SYI is operating as a state actor under the public function test, we consider whether that state action violated the Establishment Clause. We conclude that it does.

IV

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. But the "Amendment contains no textual definition of 'establishment' and the term is certainly not self-defining." *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 874-75, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005). "In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (quoting *Walz v.*

Tax Comm'n, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970)). One " 'significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion.' " *Good News Club v. Milford Cent. School,* 533 U.S. 98, 114, 121 S.Ct. 2093, 150 L.Ed.2d 151 (2001) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.,* 515 U.S. 819, 839, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). " 'In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality,* upholding aid that is offered to a broad range of groups or persons without regard to their religion.' " *Id.* (quoting *Mitchell v. Helms,* 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality opinion)).

Did the presence of the religious displays here violate the Establishment Clause? It is clear that for certain displays, in certain places, the government's "religious object is unmistakable" and a violation apparent. *McCreary,* 545 U.S. at 869, 125 S.Ct. 2722. We conclude that an Establishment Clause violation occurred, but given the fact that the state action is limited to a part of the premises, the violation-and the remedy-are limited in the same way and to the same extent.

(A) The Government Contract

The Supreme Court "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick,* 487 U.S. 589, 609, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). "It long has been established ... that the State

may send a cleric ... to perform a wholly secular task." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 746, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). The analysis is governed by the principle of neutrality: "the government may not favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals." *McCreary*, 545 U.S. at 875-76, 125 S.Ct. 2722.

With respect to the CPU program, the government has espoused a neutral position: it will contract for CPU services with both religious and secular entities; and, as to religious entities, the government makes no distinctions between faiths or sects. The fact that a CPU is located in a religious facility, or sponsored by a religious entity, or that its revenues benefit a particular faith, does not offend the Establishment Clause. Any violation must arise from the specific conditions of SYI's structure and space, and its religious displays.

(B) The Lemon Test

The primary means of evaluating an Establishment Clause challenge to a religious display remains the beleaguered *Lemon* test, articulated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105 (1971). "Under [the] *Lemon* [test], government action that interacts with religion must: (1) have a secular purpose, (2) have a principal effect that neither advances nor inhibits religion, and (3) not bring about an excessive government entanglement with religion." *Westchester Day School v. Vill. of Mamaroneck*, 504 F.3d 338, 355 (2d Cir.2007) (citing *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105); *see also*

Agostini v. Felton, 521 U.S. 203, 218, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997).

Both parties submit that the *Lemon* test is the appropriate test for evaluating the Establishment Clause challenge here (and the District Court agreed), though a review of relevant case law demonstrates that *Lemon* is difficult to apply and not a particularly useful test in determining what is permissible under the Establishment Clause.[12] Still, "it is not our role to provoke the Supreme Court into reconsidering its precedent by an aggressive (or fanciful) ruling on a vital subject." *Landell v. Sorrell,* 406 F.3d 159, 177 (2d Cir.2005) (Jacobs, J., dissenting from the denial of rehearing *en banc*).

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[12] In 2000, the Supreme Court denied *certiorari* in an Establishment Clause case, but Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented from the denial, expressing frustration with the *Lemon* test. *See Tangipahoa Parish Bd. of Educ. v. Freiler,* 530 U.S. 1251, 120 S.Ct. 2706, 147 L.Ed.2d 974 (2000) (Scalia, *J.,* dissenting from the denial of certiorari) ("Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test. I would grant *certiorari* in this case if only to take the opportunity to inter the *Lemon* test once for all.") (citations omitted). Other Justices and courts have expressed similar frustrations. *See Comm. for Pub. Educ. & Religious Liberty v. Regan,* 444 U.S. 646, 671, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) (Stevens, *J.,* dissenting) (lamenting "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon v. Kurtzman* ") (quotations omitted); *Roark v. S. Iron R-1 School Dist.,* 573 F.3d 556, 563 (8th Cir.2009) (observing that "the *Lemon* test has had a 'checkered career' ") (quoting *Van Orden v. Perry,* 545 U.S. 677, 700, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005)); *Access Fund v. U.S. Dep't of Agric.,* 499 F.3d 1036, 1042 (9th Cir.2007) ("We recognize that the *Lemon* test has hardly been sanctified by the Supreme Court.").

Accordingly, we proceed to a straightforward application of the *Lemon* test.

We first ask whether there is a secular purpose for displaying religious material on the postal counter. We cannot think of one. The express and admitted purpose of the religious material is to raise awareness for the mission sponsored by the Church and to spread the Church's Christian message. We have no trouble concluding that the displays on the postal counter soliciting prayer requests and advertising the mission express a distinctly religious purpose, and that they fail spectacularly under the first inquiry of *Lemon*. Having failed at the first juncture, there is no need to proceed further in the *Lemon* test, although it is no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion (and might arguably entangle the government excessively with religion). The religious displays on the postal counter clearly fail the *Lemon* test.

Nevertheless, the analysis is complicated by a disclaimer on the postal counter:

> The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit.

While the presence of this disclaimer informs our review, the precise impact of a disclaimer on Establishment Clause analysis is not at all clear, and this Circuit has not directly addressed the issue.

Supreme Court jurisprudence on disclaimers is not determinative. In *County of Allegheny v. ACLU,*

492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), the Supreme Court reviewed the constitutionality of [i] a crèche inside of a courthouse, and [ii] a menorah and Christmas tree displayed outside of a city building. It was a split decision: the crèche was unconstitutional, but the menorah/Christmas tree display was not. The presence of a disclaimer, however, did not save the crèche:

> The fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not alter [the] conclusion [that the display violates the Establishment Clause]. On the contrary, the sign simply demonstrates that the government is endorsing the religious message of [the] organization....

Id. at 600, 109 S.Ct. 3086. However, in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Supreme Court permitted the use of public university student-activity funds to print a newspaper for a religious student group. Justice O'Connor's concurrence took note of an "explicit disclaimer" as a justification for the outcome. *Id.* at 852, 115 S.Ct. 2510 (O'Connor, *J.*, concurring). The Ninth Circuit has likewise noted that the perception of impermissible religious endorsement was "less likely ... because of the [presence of] express disclaimers that [a religious] activity [was] not school-sponsored." *Hills v. Scottsdale Unified School Dist. No. 48*, 329 F.3d 1044, 1056 (9th Cir.2003). "[A] disclaimer arguably distances [government] officials from 'sponsoring' [religious] speech...." *Lassonde v. Pleasanton Unified*

School Dist., 320 F.3d 979, 984 (9th Cir.2003). The Sixth Circuit has also cited the presence of a disclaimer as a basis for permitting the display of a Latin cross in a public square during the Christmas season. *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 679 (6th Cir.1994) ("Of course, the display at issue here is not a government sponsored display; it is, in fact, privately funded and privately maintained, and carries an express disclaimer of any government support."). *Id.*

However useful the disclaimer is, the law does not unambiguously allow us to draw the conclusion that the disclaimer prevents or cures a violation.

V

As a general matter, federal courts have leeway to fashion appropriate relief, and "[a]ppellate tribunals have accorded district courts broad discretion to frame equitable remedies [for constitutional violations] so long as the relief granted is commensurate with the scope of the constitutional infraction." *Todaro v. Ward*, 565 F.2d 48, 54 n. 7 (2d Cir.1977). Especially in the Establishment Clause context, courts must endeavor to craft remedies that correspond to the violations. *See Bowen v. Kendrick*, 487 U.S. 589, 620, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988) ("'The District Court ... identif[ied] certain instances in which it felt [federal] funds were used for constitutionally improper purposes [under the Establishment Clause], but ... the court did not adequately design its remedy to address the specific problems it found ....'"); *see also Mitchell v. Helms*, 530 U.S. 793, 865, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'Connor, J., concurring) ("[E]xtensive violations ... will be highly relevant in

shaping an appropriate remedy.... I know of no case in which we have declared an entire aid program unconstitutional on Establishment Clause grounds solely because of violations on [a] minuscule scale....") (quotations and citations omitted).

Here, the district court ordered SYI to "remove. any and all religious displays, prayer cards, advertisements, donation solicitations, and telecommunication videos or broadcasts that proselytize or advance the religion of the [Church]." The Postal Service was also directed to prohibit SYI from posting such materials as long as it was "in the course of operating the [CPU]." However, the removal of all religious messages would render the premises a single-use post office, and would prevent the second legitimate use to which the premises are dedicated. This remedy does not correspond to the scope of the violation and the resulting harm.

The gravamen of the complaint is that Mr. Cooper was made to feel that he was an unwilling participant in a faith not his own when he entered a space dedicated to two separate functions, only one of which was apparent from the outside. Ordinarily, when CPUs are housed in churches or synagogues or monasteries or mosques, customers are alerted to the facility's religious status by cues such as ecclesiastical architecture, schedules of religious services, and religious iconography or statuary. SYI gives no visual cues to alert its customers to its function as a Christian outreach facility. So a customer walking into SYI might become bewildered as to whether a chapel has been made into a post office, or a post office has been made into a chapel.

The district court erred by extending the violation-and then the remedy-to the entire facility. The Manchester CPU is *not* a classified post office and need not be regulated as such, but the public function it performs is in tension with its (otherwise permissible) sectarian message. A direct, effective and complete remedy for the violation is one that limits the public function to designated public spaces and returns the remainder of the facility to SYI's private purposes. This can be accomplished short of frustrating either the postal function or the other lawful purposes which the Church pursues on the premises.

Since the extent of the state action (and the extent of the Establishment Clause violation) is limited to that part of the CPU fulfilling the Postal Service's mandated public function, a sufficient remedy need extend no further or elsewhere. Here, the public functions include the acceptance of mail, the processing of mail and packages for delivery, and the sale of postal goods and services. These are performed or fulfilled at the postal counter, in the post office boxes, and on the shelving housing postal products; so the postal counter and the surfaces of the post office boxes and shelving units are zones in which the function of religious outreach is out of place. The postal counter, post office boxes and shelving units must therefore be free of prayer cards and messages and must be cleared of religious material. Since the disclaimer is helpful in differentiating the public space and function from the private one, it should remain.

In order to differentiate the primary area serving the public function from the remainder of the

space operating as a private ministry, SYI is directed to create and install a barrier in front of the postal counter that is a visual cue and gives a sense of passage from one area of the space into another, thereby delineating space exclusively dedicated to the public function from space dedicated to other things. Separation and visual cues will not keep the video from being seen and overheard by postal patrons, but the source will unambiguously emanate from a zone distinct from the post office functions. We need not prescribe the specifications of the barrier, but it would do to use such things as stanchions with hanging ropes (of the kind used in a theater), or a low railing. Once the postal counter is cleared and visual cues installed, no more is required to cure the Establishment Clause violation.

CONCLUSION

For the foregoing reasons, the judgment of the district court is vacated and the case remanded for the creation of an injunction consistent with this opinion.

APPENDIX B
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BERTRAM COOPER, *Plaintiff,* *v.* U.S. POSTAL SERVICE, ET AL., *Defendants.*	No. 3:03CV01694 (DJS)

Decided and Filed: April 18, 2007
Entered: April 20, 2007

MEMORANDUM OF DECISION AND ORDER

Dominic Squatrito, District Judge.

Plaintiff, Bertram Cooper ("Cooper") brings this action for declaratory and injunctive relief against Defendants United States Postal Service ("the Postal Service"), John E. Potter ("Potter"), and Ronald G. Boyne ("Boyne") (collectively, "the Defendants"), and against Intervenor Defendants Full Gospel Interdenominational Church, Inc. ("the Church"), Dr. Philip Saunders Heritage Association, Inc. ("the Association"), and Sincerely Yours, Inc. ("SYI") (collectively, "the Intervenor Defendants"), alleging violations of his rights, and the rights of all citizens, under the Establishment Clause of the First Amendment to the United States Constitution. Now pending are the Defendants' Motion for Summary Judgment **(dkt.# 38)** and Cooper's Motion for

Summary Judgment **(dkt.# 41).**[1] For the reasons stated herein, the Defendants' motion **(dkt.# 38)** is **GRANTED in part and DENIED in part,** and Cooper's motion **(dkt.# 41)** is **GRANTED in part and DENIED in part.**

I. FACTS[2]

This case involves whether, and to what extent, it is constitutional for the Postal Service to allow a religious organization to operate a business known as a contract postal unit ("CPU"), which, pursuant to a contract with the Postal Service, provides certain postal services to the public. At all times relevant to this case, the following information applies: Cooper is a natural person residing in Manchester, Connecticut. Defendant Potter is Postmaster General of the United States, which is the chief executive officer of the Postal Service. *See* 39 U.S.C. §§ 202(c), 203. Defendant Boyne is the Postmaster of the Manchester, Connecticut post office. Intervenor Defendant the Church, a religious organization, originally signed the contract with the Postal Service for a CPU to be located on private property at 1009 Main Street in Manchester, Connecticut; this contract was subsequently transferred to Intervenor Defendant SYI, a Connecticut not-for-profit corporation that operates the CPU on private property in Manchester. The Association, also a

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[1] The court notes that the Intervenor Defendants have joined and adopted both the Defendants' motion for summary judgment and the Defendants' opposition to Cooper's motion for summary judgment. (*See* dkt. # s 59 & 60.)

[2] Based upon the parties' submissions to the court, there appear to be no genuine issues of material fact requiring trial. Instead, the parties indicate that this case presents a purely legal issue that should be decided on summary judgment.

Connecticut not-for-profit corporation, was organized to hold the real estate of the Church, and is the titleholder and landlord to the real estate located at 1009 Main Street in Manchester, Connecticut.[3]

A. THE POSTAL SERVICE AND CONTRACT POSTAL UNITS

The Postal Service, which derives its authority from the Constitution of the United States, *see* U.S. Const. art. I, § 8, cl. 7, acts as an independent establishment of the executive branch of the federal government, *see* 39 U.S.C. § 201. The general duties of the Postal Service are to plan, develop, promote, and provide adequate and efficient postal services at fair and reasonable rates and fees, and to receive, transmit, and deliver written and printed matter and parcels throughout the United States and the world. *See* 39 U.S.C. § 403. Congress has bestowed the Postal Service with the power "to provide and sell postage stamps and other stamped paper, cards, and envelopes and to provide such other evidences of payment of postage and fees as may be necessary or desirable." *Id.* § 404(a)(4).

In certain circumstances, the Postal Service enters into contracts establishing CPUs, which are distinguishable from traditional, government-run "official" post offices (also known as "classified units") staffed and operated by Postal Service employees. The Postal Service's Glossary of Postal Terms defines a CPU as

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[3] The sole incorporator of both SYI and the Association was the Reverend Eleanor Kalinsky ("Reverend Kalinsky") of the Full Gospel Interdenominational Church, Inc.

> a postal unit that is a subordinate unit within the service area of a main post office. It is usually located in a store or place of business and is operated by a contractor who accepts mail from the public, sells postage and supplies, and provides selected special services (for example, postal money order or registered mail).

(Dkt.# 49-B, Ex. 16.) CPUs are operated by persons who are not postal employees. (*See id.*, Ex. 20.) CPUs are not permitted to provide products from competing services such as Federal Express or the United Parcel Service, but they may conduct non-postal business on the premises in an area that is separate and distinct from the postal products. All postal funds must be kept separate from the non-postal funds.

The Postal Service relies upon CPUs to bring postal services to areas in which the Postal Service has determined that the establishment of a classified unit would be unfeasible. There are approximately 5,200 CPUs nationwide, and they are currently operated in, among other places, colleges, grocery stores, pharmacies, quilting shops, and private residences. The Postal Service has represented that there are several CPUs being operated by institutions and groups with religious affiliations.

The Postal Service asserts that CPUs are more cost-effective than classified units because CPUs offer the same products as classified units, but without the costs (e.g., employee salaries and benefits) associated with classified units. Contracts for CPUs usually come in two varieties, performance-based contracts and fixed-price

contracts. A performance-based contract is a contract in which the supplier is paid in relationship to how much revenue the CPU generates. Some factors for determining the percentage that a supplier will receive under a performance-based contract are: the competition in the area; the need in the community; and the cost for operating that particular CPU. A fixed-price contract is a contract in which the supplier receives twelve monthly payments per year to reflect the annual rate, regardless of the amount of revenue the CPU generates. The Postal Service prefers performance-based CPU contracts.

The decision to open a CPU starts at the local level, where issues such as the length of the wait lines at classified units, area need, cost, and competition are considered. Once it has been determined that a particular area is in need of a CPU, there is an approval process from the local level to the Postal Service's district office. The Postal Service then engages in a solicitation and evaluation process whereby the Postal Service solicits bids from the community for CPU locations. The Postal Service receives and evaluates the bids. Selection for the awarding of a CPU contract is based on a formula regarding a "business score" and a "price score," and the standard criteria used in evaluating CPU proposals are: suitability of location, suitability of the facility, and ability to provide services.

Each CPU has a contracting officer representative appointed to oversee that CPU. The contracting officer representative is responsible for administering the contract. Once a CPU contract has been awarded, the contracting officer representative has the responsibilities of conducting on-site

reviews, performing an annual review of the CPU's bond, conducting periodic financial reviews with an annual audit, and reviewing the operating/service hours at the CPU. There is no required schedule that a contracting officer representative must keep with regard to a CPU, although he must conduct on-site reviews "periodically."

B. THE SINCERELY YOURS, INC. CONTRACT POSTAL UNIT

Boyne, who is a member of the Church, has been the Postmaster for the Town of Manchester since 1998. Boyne has been trained to oversee CPUs and has acted as a contracting officer representative on several occasions at various CPUs; however, he has testified that he spends minimal time on CPU matters. Before the CPU contract was awarded to the Church (which was later transferred to SYI), the Town of Manchester had two prior CPUs in operation, the Weston Pharmacy CPU and the Community Place CPU, which provided postal services to a large contingent of the Manchester community for whom the trek to the classified Manchester Post Office was too burdensome or inconvenient. Boyne was the contracting officer representative for the Community Place CPU from 1998 through October 2001, when the Community Place CPU closed.

Eight months prior to closing, the Community Place CPU gave the Postal Service notice of its closing. There was substantial community interest generated by this closing, as the community sought to find a suitable replacement. Although the Postal Service considered establishing a second classified unit in Manchester, it ultimately decided to contract

for a new CPU. The Postal Service immediately began a search to find a site that would replace the Community Place CPU. This search included the solicitation of proposals for a new CPU, and the Postal Service sent solicitations throughout the Manchester community. Boyne states that he met with the mayor of Manchester, "two congressmen and the senator," [4] the board of directors for the Town of Manchester, and the Manchester Downtown Council regarding the replacement CPU. Two organizations submitted bids to operate the replacement CPU: Manchester Hardware, Inc. ("Manchester Hardware") and the Church. Apparently, before the Church and Manchester Hardware submitted their competing bids, Manchester Hardware had submitted previous bids, which the Postal Service rejected. The Postal Service evaluation committee for the CPU bids submitted by Manchester Hardware and the Church consisted of Denise Adessa, Tony Impronto, and Mark Kielbasa. This committee gave the Church a higher suitability score than Manchester Hardware,[5] and on November 20, 2001, the Postal Service awarded the CPU contract to the Church. Boyne was not involved in the evaluation, selection, or award of the CPU contract to the Church. On October 9, 2003, the Church and the Postal Service modified the CPU contract by replacing the Church with SYI, a corporation set up by the Church for the purpose of

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[4] In the portions of Boyne's deposition testimony that were submitted to the court, Boyne does not identify these three legislators by name. (*See* dkt. # 40, Ex. 4, Boyne Dep. at 29:11-12.)

[5] Cooper admits that Manchester Hardware's bid was higher than the Church's bid.

establishing the CPU, and SYI began to run the CPU ("the SYI CPU").

Pursuant to the terms of the SYI CPU contract, the interior and exterior of the SYI CPU premises are to be kept clean, neat, uncluttered, and in good repair. The SYI CPU must contain signage indicating that the establishment is a contract postal unit and providing the address of the nearest Postal Service Administrative Office. All money collected at the SYI CPU is the property of the Postal Service, and all payments to SYI by the Postal Service are made in arrears after each Postal Service accounting period. As part of the SYI CPU contract, the Postal Service was required to pay for, among other things, the build-out of the SYI CPU counter and the construction of post office boxes at the SYI CPU. SYI was to pay for all other renovations to the building that housed the SYI CPU. Under the terms of the SYI CPU contract, SYI receives, as compensation, 18% of all sales made at the SYI CPU and 33% of all post office box rental proceeds. As the contracting officer representative, Boyne (or one of his supervisors) conducts periodic on-site reviews of the SYI CPU to ensure that SYI is in compliance with the contract; Boyne's contact and oversight of the SYI CPU is, however, minimal. SYI runs the day-to-day operations of the SYI CPU, and SYI has the authority to hire and fire its CPU employees. SYI pays for its employees to receive training from the Postal Service with regard to running a CPU; this training includes learning about accounting procedures and equipment operation. SYI employees do not, however, wear Postal Service uniforms.

C. DISPLAYS IN THE SYI CPU

As stated above, the Church is a religious organization. Pursuant to the Church's charter, the Church's mission is to "engage in the preaching of the Gospel of Jesus Christ in the State of Connecticut[,] ... the United States and ... foreign lands." In addition, "It shall be the object of [the Church] to establish[,] among other things[,] Churches, whenever and wherever possible, for the advancement of the kingdom of Jesus Christ" and to "send forth preachers and workers whose principle [sic] objective shall be to promote the Kingdom of the Lord Jesus Christ...." (Dkt. # 49-B, Ex. 2 ¶ 1(b).)

The SYI CPU contains both religious and non-religious displays. The exterior wall of the SYI CPU, which faces the street, has a label with the stylized eagle of the Postal Service indicating that the premises contains a Postal Service contract postal unit. The sign over the threshold to the building reads "Sincerely Yours." Another sign on the outside of the SYI CPU reads, in cursive type, "Sincerely Yours, Inc." and, in print type, "United States Contract Post Office."

The interior of the SYI CPU contains evangelical displays, including posters, advertisements, artwork, and photography, which change at various times during the year. Upon entering the SYI CPU, a postal counter, built by the Postal Service, sits immediately to the customer's right; behind the counter is a slat wall, also built by the Postal Service. In their submissions to the court, the parties describe the religious displays in the SYI CPU as follows:

(1) On the wall directly to the right of the postal counter and slat wall is a large religious display that

informs customers about Jesus Christ and invites them to submit a request if they "need prayer in their lives." Specifically, this display states:

> Do you or someone you know need prayer? At this very moment someone is praying in our 24 hour Prayer Tower and we would love to pray for you. Please drop your request into our confidential prayer box, or if you would prefer to speak to someone personally, call our Church office.
>
> Once your need has been answered, we'd be so happy to hear from you. Please call our Church office ... and let our receptionist know that God has answered your prayer.
>
> "Trust in him at all times; ye people pour out your heart before him; God is a refuge for us." Psalm 62:8
>
> "When you feel you're all alone, and your heart would break in two, remember, someone is praying for you."

(*Id.*, Ex. 8.)

(2) Directly on the postal counter adjacent to this display sits a pile of "prayer cards" and a box into which postal service customers can put their prayer requests. The message on the front of the prayer cards reads:

> Twenty-four hours a day, someone is on their [sic] knees praying for the needs of others. If you have a need or prayer request, you can fill out this prayer card or call our Church Office at anytime. If you receive an answering machine, leave a message. Your

> call will be received and someone will be praying on your behalf.

(*Id.*, Ex. 9.) The reverse side of the prayer cards reads: "Let us Join with You in Prayer. We have a 24-hour Prayer Tower at the Full Gospel Interdenominational Church, Inc., continually praying on the behalf of others." (*Id.*)

(3) There is another display in the SYI CPU containing a framed advertisement for World-Wide Lighthouse Missions, the missionary organization incorporated by the Church to which the SYI CPU's profits are donated. This display, which sits directly opposite a shelving unit containing official USPS postal supplies and forms and above a table used by customers filling out USPS paperwork, offers biblical quotations and explains that the organization is "Endeavoring to Reach the World with the Love of Jesus Christ, one life at a time." (*Id.*, Ex. 2 ¶ 9(c)(vii).)

(4) Directly to the right of the World-Wide Lighthouse Missions display is yet another display that provides additional information about World-Wide Lighthouse Missions, including pamphlets describing various "hands of ministry" trips and envelopes and "appeal flyers" soliciting donations. To the right of this display, immediately to the left of the Postal Service postal boxes, is a donation box, decorated with World-Wide Lighthouse Missions mission photographs.

(5) A "World-Wide Lighthouse Missions" coin donation jar, decorated with mission photographs, sits on the postal counter.

(6) To the left of the postal counter, a television monitor displays Church-related religious videos directly ahead, and in plain view, of customers waiting in line at the postal counter. These television displays have included: videotaped talks by Reverend Kalinsky on various Christian topics; videos explaining the mission of World-Wide Lighthouse Missions, Inc.; a video highlighting the activities of the Church's Sunday School program; a video of performances from several of the Church's choirs; a video entitled "God's Thoughts Toward Us," which promotes the Church's Vacation Bible School; and other videos of television broadcasts that include audible soundtracks with scripture messages and gospel songs.

(7) Above the official Postal Service rental post boxes and on the wall across from the transaction counter are various 8 1/2 " x 14" photographs of a number of the Church's events. Among these photographs is a picture of "Wally," a character who delivers Bibles, and conveys religious messages through puppets acting out skits, to children in the community. Wally is depicted standing beside George Washington and Abraham Lincoln.

(8) In addition to the above-listed displays, the SYI CPU features additional seasonal displays, including a large extended crèche, which is displayed in the SYI CPU's storefront window during the Christmas holiday season. In addition, there are, at various times, video presentations displayed on a television set inside the SYI CPU.

For its part, the Postal Service states that it does not encourage or induce SYI to display the religious materials in the SYI CPU. On the SYI CPU

transaction counter, there is a sign, provided by the Postal Service, which reads: "The United States Postal Service does not endorse the religious viewpoint expressed in the materials posted at this Contract Postal Unit." (Dkt. # 52-2, Ex. 8 ¶ 12(a)(1) & attached pictures.) To the right of this disclaimer is another sign, which reads: "[The SYI] United States Contract Postal Unit is operated by the Full Gospel Interdenominational Church. Thank you for your patronage." (*Id.*, Ex. 8 ¶ 12(a)(2).) The Intervenor Defendants maintain that SYI does not permit its employees to proselytize at the SYI CPU, and that, if a SYI CPU customer requests a prayer, SYI employees are instructed to refer such customers to the Church itself.

D. THE PLAINTIFF'S CONTACT WITH THE SYI CPU

Cooper, a Manchester, Connecticut resident, maintains that he lived "considerably closer" to the SYI CPU than to the Manchester Post Office. The Defendants deny this assertion, claiming that Cooper lived approximately three miles from both the SYI CPU and the Manchester Post Office. Cooper visited the SYI CPU on a number of occasions, and states that the religious displays there made him "very uncomfortable." On one occasion, Cooper complained about these religious displays to the employees in the SYI CPU. In response to his concerns, Cooper was told that if he did not like the religious displays, he could go somewhere else. Cooper claims that he subsequently did go to the Manchester Post Office to satisfy his postal needs, but the travel involved in doing so is more difficult for him than the travel to the SYI

CPU. The Defendants deny that Cooper endured a greater difficulty by traveling to the Manchester Post Office rather than to the SYI CPU. Cooper asserts the circumstances surrounding the SYI CPU violate the Establishment Clause of the First Amendment to the United States Constitution.

II. DISCUSSION

There are two motions for summary judgment pending before the court, the Defendants' and Cooper's. The parties do not contend that there are issues of fact that need to be resolved. Rather, both claim that, based on the facts the court described above, each is, as a matter of law, entitled to summary judgment. In his Complaint, Cooper seeks: (1) a judgment, entered pursuant to 28 U.S.C. § 2201, declaring that the Defendants have violated his First Amendment rights insofar the Defendants' actions have delegated a "governmental power to a pervasively sectarian institution that exercises such power in a manner inextricably entangled with religious symbolism and expression" and distributed "public funds to a pervasively sectarian institution that uses said funds for the advancement of religion"; and (2) a permanent injunction ordering the Defendants, and their agents, representatives, successors, and those acting in concert with them, to: (a) cease and desist from delegating governmental power to SYI, to the extent that SYI exercises that power in manner inextricably entangled with religious symbolism and expression; (b) cease and desist from distributing public funds to SYI, to the extent that SYI uses such funds for the advancement of religion; (c) take all necessary action to ensure that SYI, in the course of providing postal services,

ceases acting in a manner that proselytizes or advances religion; (d) provide adequate and ongoing notice to all CPUs that religious messages may not be conveyed, or religion otherwise advanced, in a manner entangled with the exercise of the CPU's authority pursuant to its contract with the Postal Service; (e) institute adequate and ongoing procedures for the monitoring of CPUs to ensure compliance with any injunction the court may issues; and (f) adopt adequate and ongoing procedures for correcting violations of any injunction the court may issue.[6] The Defendants, for their part, ask that the court reject Cooper's First Amendment claims and grant summary judgment in their favor on all of Cooper's claims.

A. SUMMARY JUDGMENT STANDARD

A motion for summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

Summary judgment is appropriate if, after discovery, the nonmoving party "has failed to make a sufficient showing on an essential element of [its] case with respect to which [it] has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). "The burden is on the moving party 'to demonstrate the absence

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[6] Cooper also asks that the court grant him his costs and attorney's fees and "[o]rder such other relief as justice may require."

of any material factual issue genuinely in dispute.' " *Am. Int'l Group, Inc. v. London Am. Int'l Corp.*, 664 F.2d 348, 351 (2d Cir.1981) (quoting *Heyman v. Commerce & Indus. Ins. Co.*, 524 F.2d 1317, 1319-20 (2d Cir.1975)).

A dispute concerning a material fact is genuine " 'if evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 523 (2d Cir.1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). The Court must view all inferences and ambiguities in a light most favorable to the nonmoving party. *See Bryant v. Maffucci*, 923 F.2d 979, 982 (2d Cir.1991). "Only when reasonable minds could not differ as to the import of the evidence is summary judgment proper." *Id.*

B. ANALYSIS

The First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. Cooper maintains that the Defendants are violating the First Amendment because the SYI CPU is a state actor whose religious displays and religious affiliation are prohibited under the First Amendment. Cooper bases his claim that the SYI CPU is a state actor under two theories: (1) the Postal Service has delegated "a uniquely public function to the Church"; and (2) the Postal Service is "deeply entwined in the management and control of the SYI CPU." Cooper claims that the religious displays at the SYI CPU would thus constitute speech by a state actor that is prohibited under the

First Amendment. Cooper further maintains that, even if the SYI CPU were not a government actor, its actions would still violate the First Amendment as constituting governmental support and promotion of religious communications. The Defendants reject all of Cooper's claims. The court shall analyze Cooper's claims seriatim.

1. State Action [7]

It is a fundamental principle of constitutional law that the First Amendment applies only to state actors. *See Gorman-Bakos v. Cornell Co-op Extension of Schenectady County,* 252 F.3d 545, 551 (2d Cir.2001). The purpose of this "state action" requirement is not only to "preserv[e] an area of individual freedom by limiting the reach of federal law and avoi[d] the imposition of responsibility on a State for conduct it could not control ..., but also to assure that constitutional standards are invoked when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n,* 531 U.S. 288, 295, 121 S.Ct. 924, 148 L.Ed.2d 807 (2001) (internal quotation marks and citations omitted) (alterations in original). The court must first determine whether the conduct alleged here meets the "state action" requirement.

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[7] The court points out that much of the case law regarding "state action" addresses the relation of the Fourteenth Amendment, which applies to the individual States and not the federal government, to private entities. Nevertheless, "The standards utilized to find federal action, necessary to sustain a claim under the Constitution, have been held to be identical to those employed to detect 'state action.' " *Wenzer v. Consol. Rail Corp.,* 464 F.Supp. 643, 647 (D.Pa.1979).

"For the conduct of a private entity to be fairly attributable to the state, there must be such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Flagg v. Yonkers Sav. and Loan Ass'n,* 396 F.3d 178, 187 (2d Cir.2005) (internal quotation marks omitted). "What is fairly attributable [as state action] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad.,* 531 U.S. at 295, 121 S.Ct. 924. Indeed, "no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.* at 295-96, 121 S.Ct. 924. There are "a host of facts that can bear on the fairness of such an attribution." *Id.* at 296, 121 S.Ct. 924. As the Supreme Court has noted,

> [A] challenged activity may be state action when it results from the State's exercise of coercive power, ... when the State provides significant encouragement, either overt or covert, ... when a private actor operates as a willful participant in joint activity with the State or its agents, ... when [the private actor] is controlled by an agency of the State, when [the private actor] has been delegated a public function by the State, when [the private actor] is entwined with governmental policies, or when government is entwined in [the private actor's] management or control.

Id. (internal quotation marks and citations omitted); *see Gorman-Bakos,* 252 F.3d at 552.

a. Delegation of Public Function to Private Actor

"State action may be found in situations where an activity that traditionally has been the exclusive, or near exclusive, function of the State has been contracted out to a private entity." *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 151 (2d Cir.2004); *see Jackson v. Metro. Edison Co.,* 419 U.S. 345, 352, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974) (finding "state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State"). The Supreme Court has applied this test strictly. "The fact '[t]hat a private entity performs a function which serves the public does not make its acts [governmental] action.' " *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.,* 483 U.S. 522, 544, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987) (quoting *Rendell-Baker v. Kohn,* 457 U.S. 830, 842, 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982)). In addition, the acts of private contractors "do not become acts of the government by reason of their significant or even total engagement in performing public contracts." *Rendell-Baker,* 457 U.S. at 841, 102 S.Ct. 2764. Rather, as this district has noted, "to constitute state action under the public function doctrine, private conduct must not only be something the government traditionally does, but it also must be something that *only* the government traditionally does." *Szekeres v. Schaeffer,* 304 F.Supp.2d 296, 311 (D.Conn.2004) (emphasis in original).

There is no question that the function performed by the Postal Service is a public one. Indeed, the Postal Services's very *raison d'être, see supra* Part I.A., is to provide services to the public. Thus, insofar

as the SYI CPU operates under its contract with the Postal Service, it also provides a public function. As noted above, however, the performance of a function that serves the public is not, by itself, dispositive of the issue here. In addition, the fact that the SYI CPU performs its public services pursuant to a contract with the Postal Service does not render its conduct as state action. Rather, the question is whether the Postal Service has delegated to the SYI CPU a function that is traditionally the exclusive prerogative of the government.

The function of postal services, and hence the function delegated to the SYI CPU, is one that has traditionally been performed by the government. In England, the sovereign has provided postal services since, at least, the early sixteenth century, when King Henry VII "instituted [a] ... permanent letter carriage on specified routes." Christina M. Bates, *From 34 Cents to 37 Cents: The Unconstitutionality of the Postal Monopoly,* 68 Mo. L.Rev. 123, 126 (Winter 2003). "By the early 18th century, the posts were made a sovereign function in almost all nations because they were considered a sovereign necessity." *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 121, 101 S.Ct. 2676, 69 L.Ed.2d 517 (1981). The English postal system was eventually brought to the British colonies in North America. At first, the "individual colonial assemblies organized postal systems of their own.... [In 1707, however,] the English Post Office ... established a postal system within the American colonies." Bates, *supra,* at 128. In July of 1775, after the American colonists began to resist English management of the postal system, "the Continental Congress, compelled

by the need for a dependable channel of communication to the army and to state assemblies upon which it relied for financial support, established its own government-managed postal operation." *Id.* at 129. The Articles of Confederation, enacted after the American Revolution, "granted the Congress the 'power of ... exacting such postage ... as may be requisite to defray the expences [sic] of the said office ... (conferring upon Congress) the sole and exclusive right (of) establishing and regulating post offices.' " *Id.* at 130 (quoting Articles of Confederation, art. IX, in 9 Journals of the Continental Congress 919 (Worthington C. Ford, ed. U.S. Government Printing Office, 1907)). Finally, the U.S. Constitution itself authorizes Congress "[t]o establish Post Offices and post Roads," U.S. Const. art. I, § 8, cl. 7, and the Postal Service has operated throughout nearly the entire history of the United States, *see generally* Bates, *supra.* Therefore, it is clear to the court that the performance of postal services is a traditional function of the government.

The issue here, though, is not only whether the government has traditionally performed postal services, but whether such services have traditionally been the exclusive function of the government. The Supreme Court has found very few activities qualify under the "public function" test. To date, the Supreme Court has found only the operation of a company town, *see Marsh v. Alabama,* 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), the management of a municipal park, *see Evans v. Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), the running of an election, *see Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984

(1932); *Terry v. Adams,* 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953), and the furnishing of medical treatment to injured prison inmates, *see West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988), to constitute public functions that are traditionally the exclusive prerogative of the government. In addition, the Supreme Court has declined to find an exclusive state function in a wide variety of circumstances. *See, e.g., Blum v. Yaretsky,* 457 U.S. 991, 1011-12, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982) (nursing home care); *Rendell-Baker,* 457 U.S. at 842, 102 S.Ct. 2764 (education of children); *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149, 161-64, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) (enforcement of statutory lien by a private warehouse); *Jackson,* 419 U.S. 345, 352-53, 95 S.Ct. 449, 42 L.Ed.2d 477 (furnishing of utility services). The court must therefore examine whether the services at issue here would qualify under the Supreme Court's "public function" test.

"Since its establishment, the United States Postal Service has exercised a monopoly over the carriage of letters in and from the United States. The postal monopoly is codified in the [Private Express Statutes], 18 U.S.C. §§ 1693-1699 and 39 U.S.C. §§ 601-606." *Air Courier Conference of Am. v. Am. Postal Workers Union AFL-CIO,* 498 U.S. 517, 519, 111 S.Ct. 913, 112 L.Ed.2d 1125 (1991); *see U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.,* 540 U.S. 736, 741, 124 S.Ct. 1321, 158 L.Ed.2d 19 (2004) ("[T]he Postal Service retains [a] monopoly over the carriage of letters."). In fact, aside from a few exceptions, Congress, through the Private Express Statutes, has made it a crime for private entities to

> establish[ ] any private express for the conveyance of letters or packets,[8] or in any manner causes or provides for the conveyance of the same by regular trips or at stated periods over any post route which is or may be established by law, or from any city, town, or place to any other city, town, or place, between which the mail is regularly carried....

18 U.S.C. § 1696(a). Indeed, as the Code of Federal Regulations states,

> It is generally unlawful under the Private Express Statutes for any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity. Violation may result in injunction, fine or

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[8] The Eighth Circuit has pointed out that "[t]he expression 'letters' or 'packets' occurs in the postal laws of our county from the beginning and was intended to include communications in writing conveyed from one person to another." *Williams v. Wells Fargo & Co. Express*, 177 F. 352, 357 (8th Cir.1910). "Thus a correspondence limited to a single sheet was formerly called a single letter; two sheets a double letter; and three sheets a triple letter. All such communications composed of four or more sheets were called a packet." *Id.* Historically, the term "packet" has not been construed to mean "parcels or packages of merchandise," and the government "has neither attempted to reserve to [the Postal Service] a monopoly of the transportation of merchandise in parcels or packages weighing less than four pounds, nor ... prohibited private express companies or others making regular trips over established post roads or between cities where mails are regularly carried, from engaging in the business of carrying such parcels of merchandise for hire" *Id.* at 358.

> imprisonment or both and payment of postage lost as a result of the illegal activity.

39 C.F.R. § 310.2(a).

Nevertheless, although the sending and carrying of letters via postal routes have traditionally been monopolized by the state and not performed by private entities, *cf. Kann Corp. v. Monroe,* 425 F.Supp. 169, 171 (D.D.C.1977), Congress, in certain circumstances, has allowed private entities to perform such postal services. As the Supreme Court has noted, "In 1979, the Postal Service suspended the [Private Express Statutes] restrictions for 'extremely urgent letters,' thereby allowing overnight delivery of letters by private courier services." *Air Courier Conference of Am.,* 498 U.S. at 519, 111 S.Ct. 913 (quoting 39 C.F.R. § 320.6). In addition, "the provisions of 18 U.S.C. § 1696(c)[ ] allow[ ] private conveyance of letters if done on a one-time basis or without compensation, and [the provisions of] 39 U.S.C. § 601(a)[ ] allow[ ] letters to be carried out of the mails if certain procedures are followed...." *Id.* at 525, 111 S.Ct. 913. Furthermore, "A provision of the [Private Express Statutes] allows the Postal Service to 'suspend [the Private Express Statutes restrictions] upon any mail route where the public interest requires the suspension.' " *Id.* at 519, 111 S.Ct. 913 (quoting 39 U.S.C. § 601(b)).

In addition, despite the Postal Service's monopoly over the carriage of letters, not all public services performed by the Postal Service are traditionally the exclusive function of the government. For example, the delivery of packages of merchandise has not traditionally been the

exclusive prerogative of the state. As the Eighth Circuit stated in 1910:

> While from [case law] it will be seen many questions arose touching the right of the government to be protected in its monopoly in the business of receiving, transporting, and delivering the mail matter of the country, consisting of letters or packets of letters, and touching the construction of penal laws designed to prohibit all others than the Post Office Department of the government from engaging in the business of carrying letters or packets for hire over post roads, yet in [no case] has it been decided or even contended the word "packet" ... was designed or intended by Congress to be construed as granting the Post Office Department a monopoly of the right to receive, transport, and deliver parcels or packages of merchandise. On the contrary, the entire history of the legislation on this subject from the beginning, and the many adjudicated cases as well, show the legislative intent to have been to maintain for the government a monopoly only of the carriage of its mails, consisting of letters and packets of letters, and the like mailable matter. While it is true parcels or packages of merchandise ... may be received and carried through the mails, yet that the government has neither attempted to reserve to its Post Office Department a monopoly of the transportation of merchandise in ... packages weighing less than four pounds,

nor has prohibited private express companies or others making regular trips over established post roads or between cities where mails are regularly carried, from engaging in the business of carrying such parcels of merchandise for hire, is evident from the language employed in the opinion of the Supreme Court in *Express Cases,* 117 U.S. 1, 6 S.Ct. 542, 29 L.Ed. 791 [1886].... And that it has not reserved such right of monopoly in the carriage of merchandise such as was carried in this case by defendant, and perhaps lacks the constitutional power to so do, is clearly stated in the opinion delivered by Mr. Justice Field in *Ex parte Jackson,* 96 U.S. 727, 6 Otto 727, 24 L.Ed. 877 [1877], wherein it is said:

"But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may perhaps prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of letters, and of newspapers and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend."

Williams, 177 F. at 358-59. Indeed, when discussing "state action" as it relates to a private parcel delivery service, one district court has stated that, although "[o]ne normally associates parcel delivery with government action," there "is not a sufficient similarity [between the Postal Service and private parcel delivery services] upon which to base a finding of state action similarity," and that "[t]he public function analogies are insufficient for the added reason that parcel delivery service has never been a state monopoly in this country." *Howe v. United Parcel Serv., Inc.*, 379 F.Supp. 667, 673-74 (S.D.Iowa 1974).

Based upon the relevant case law and the facts of this case, the court cannot conclude that the Postal Service has contracted out to the SYI CPU an activity that traditionally has been the exclusive function of the government. First, the monopoly the Postal Service has over the carriage of letters is not dispositive here. The monopoly created by Congress makes it unlawful for "any person other than the Postal Service in any manner to send or carry a letter on a post route or in any manner to cause or assist such activity." 39 C.F.R. § 310.2(a). Even if the court were to find that the sending and carrying of letters on postal routes is traditionally the exclusive function of the government,[9] such a finding would not settle the issue before the court. As noted above, *see supra* Part I.A., contract postal units, such as the SYI CPU, accept mail from the public, sell postage and supplies, and provide selected special services,

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[9] Given the fact that there are exceptions to the Postal Service's monopoly, the court is not certain that the "exclusivity" element of the "public function" test is met.

including postal money orders and registered mail. There is no indication that CPUs, including the SYI CPU itself, actually carry or send letters over postal routes in a fashion similar to private express courier services such as Federal Express or the United Parcel Service. That is to say, the Postal Service has not contracted out to a private entity an activity that traditionally has been the exclusive function of the state because the SYI CPU does not perform, either for itself or for other private entities, the specific activity (i.e., the delivery and carrying of letters over postal routes) over which the Postal Service maintains its monopoly. Consequently, even if the carriage of letters is traditionally the exclusive function of the state, the SYI CPU, because it does not perform this function, cannot be considered a state actor on that account.

Second, with regard to the above-mentioned functions actually performed by the SYI CPU, such functions are not encapsulated within the Postal Service's congressionally-created monopoly, and therefore, on that account, the court cannot say that they are traditionally the exclusive prerogative of the government. The "public function" test does not, however, have to be met through a congressionally-created monopoly. Nevertheless, the court finds that the various services performed by the SYI CPU are not exclusive to the government for the simple reason that such services are performed by various private entities throughout the country. One does not traditionally need to go to a post office to buy postal supplies or money orders. Such services are not "exclusive" to the government. In addition, as indicated above, the delivery of packages of

merchandise (i.e., non-letter packages) has not traditionally been the exclusive function of the government. In fact, even the selling of government stamps is not "exclusive" to the government. One can buy stamps at a number of private institutions (such as, for example, grocery stores), and not have to travel to a post office to purchase postage. Indeed, the fact that the Postal Service has thousands of CPUs operating across the country performing the above-mentioned postal services is itself an indication that those services are not exclusively performed by the government. Therefore, the court finds that there is no state action here under the "public function" test. Consequently, Cooper's motion for summary judgment is denied insofar as his motion is based upon the "public function" test for state action.

b. Entwinement

"In certain circumstances, a private organization may be so entwined with government that its conduct may be deemed *per se* state action." *Lown v. Salvation Army, Inc.*, 393 F.Supp.2d 223, 244 (S.D.N.Y.2005) (citing *Brentwood Acad.*, 531 U.S. 288, 121 S.Ct. 924, 148 L.Ed.2d 807; *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 115 S.Ct. 961, 130 L.Ed.2d 902 (1995)). "That is, the State need not have coerced or even encouraged the events at issue in the plaintiff's complaint if 'the relevant facts show pervasive entwinement to the point of largely overlapping identity' between the State and the entity that the plaintiff contends is a state actor." *Horvath*, 362 F.3d at 154 (quoting *Brentwood Acad.*, 531 U.S. at 303, 121 S.Ct. 924). For example, in *Brentwood Academy*, the Supreme Court held that a

high school athletic association was a state actor because it was overwhelmingly controlled by public officials acting in their official capacities, and because its staff was eligible for certain public employee benefits. *See Brentwood Acad.*, 531 U.S. at 299-300, 121 S.Ct. 924. The Supreme Court found the entwinement in *Brentwood Academy* to be so pervasive that the athletic association's actions constituted state actions. *Id.* at 291, 121 S.Ct. 924.

Given the facts of this case, the court finds that the SYI CPU is so entwined with the Postal Service that the SYI CPU's actions may be considered the actions of the Postal Service. The Defendants argue that there is no evidence from which a reasonable finder of fact could conclude that the Postal Service has entwined itself with the SYI CPU. To support its argument, the Defendants point out that the signs on the outside of the SYI CPU indicate to the public that the SYI CPU is not an "official" post office, but rather a contract postal unit that is operated by a private entity on private property. In addition, the Defendants maintain that the Postal Service has no proprietary interest in the SYI CPU other than the postal products and equipment, and that there is no evidence that it has some direct financial stake in the SYI CPU's success in running the contract postal unit. The Defendants further maintain that the Postal Service's relationship with the SYI CPU is purely commercial, and that the employees of the SYI CPU, which controls all internal management decisions, are not Postal Service employees, that it has minimal direct involvement with the daily operations of the SYI CPU, and that there are no government employees on the Board of Directors of

SYI or the Church. According to the Defendants, these facts demonstrate that the SYI CPU is a private, not state, actor, and that any religious displays in the SYI CPU are wholly attributable to SYI, not the Postal Service. The Defendants claim that the fact that the SYI CPU provides postal services to the public, and generates revenue from such services, does not justify a finding of government action.

The court is not persuaded by the Defendants' arguments here. The Defendants claim that the signs outside the SYI CPU indicate to the public that the SYI CPU is not an "official" post office, but a contract postal unit that is operated by a private entity on private property. Based on the various exhibits submitted by the parties, the court can discern at least two signs on the outside of the SYI CPU (one on the front door and one hanging on the outside wall) that state "Sincerely Yours, Inc. United States Contract Postal Unit." The court does not agree, however, that SYI CPU customers will automatically interpret the phrase "United States Contract Postal Unit" to mean that this particular site is a private entity providing postal services on private property, not an "official" post office. There is no definition of "contract postal unit" contained in the signs outside of the SYI CPU, and the court is highly doubtful that the public at large understands the implications of the term "contract postal unit" (i.e., that a CPU is operated by a private contractor, not the Postal Service). Indeed, the words "United States" in "United States Contract Postal Unit" may lead the public to believe that the SYI CPU is an "official" post office run by the government.

Moreover, there is a relatively substantial sign on the outside of the SYI CPU that contains the words "United States Post Office" and displays the Postal Service's aquiline emblem. (*See* dkt. # 49-B, Exs. 3 & 4; dkt. # 40, Ex. 8.) Such a sign most likely indicates to the SYI CPU's customers that the SYI CPU is an "official" branch of the Postal Service. Therefore, the Defendants have not demonstrated that the signage on the outside of the SYI CPU informs the public that the SYI CPU is, in fact, a private entity operating on private property.

As for the Defendants' arguments that it has no proprietary interest in the SYI CPU other than the postal products and equipment, and that there is no evidence that it has some direct financial stake in the SYI CPU's success in running the contract postal unit, the court finds such arguments to be without merit. The contention that Postal Service has no proprietary interest "other than the postal products and equipment needed to operate the CPU" is of doubtful merit, considering one of the SYI CPU's main functions is to provide postal products and services by using postal equipment. In addition, the Postal Service, pursuant to its contract with SYI, was required to pay for the build-out of the SYI CPU counter and the construction of post office boxes within the SYI CPU. The Defendants' assertion that there is no evidence that it has a direct financial stake in the SYI CPU's success is inconsistent with the facts here. The Postal Service, although providing a public service, functions to generate revenue for the federal government.[10] In some

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[10] In fact, the generation of revenue is the reason why Congress granted the Postal Service a monopoly over the sending and

circumstances, the Postal Service has decided that, instead of opening new classified units in particular locations, its interests (financial and otherwise) would be best served by contracting out certain postal services to private entities in those locations. The Defendants admit that the Postal Service's relationship with SYI is commercial, as, pursuant to the Postal Service's contract with SYI, it receives a percentage of the revenue generated at the SYI CPU. It is true, as the Defendants point out, that the governmental receipt of revenue generated by a private entity is not, in and of itself, enough to establish state action by that private entity. *Cf. Rendell-Baker,* 457 U.S. at 847, 102 S.Ct. 2764. Nevertheless, the Postal Service's receipt of revenue from the SYI CPU's conduct is a relevant fact that can be used, along with other facts, to show pervasive entwinement.

The Defendants further argue that, as the employees of the SYI CPU are not Postal Service employees, and because the Postal Service has minimal direct involvement with the daily operations of the SYI CPU, the Postal Service has

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carrying of letters over postal routes Congress did not grant the Postal Service this monopoly because the Postal Service is inherently better than private couriers at providing such services. Rather, "[t]he monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission." *Air Courier Conference of Am.*, 498 U.S. at 519, 111 S.Ct. 913. That is, the monopoly "prevents private competitors from offering service on low-cost routes at prices below those of the Postal Service, while leaving the Service with high-cost routes and insufficient means to fulfill its mandate of providing uniform rates and service to patrons in all areas, including those that are remote or less populated." *Id.*

not entwined itself with SYI. The parties agree that the SYI CPU's employees are not employees of the Postal Service.[11] Still, the fact that SYI CPU employees are not Postal Service employees is not dispositive. Cases in which courts must decide the "state actor" question involve, by their very nature, conduct by private entities or individuals. *See, e.g., West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) (holding a private physician under contract with North Carolina to provide orthopedic services at a state-prison hospital on a part-time basis was a state actor). Indeed, the issue before the court centers around the question of whether conduct that was not performed by the government through government employees should nevertheless be attributed to the government. If the workers at the SYI CPU were, in fact, Postal Service employees, the court's task would be simpler because the court could more readily find government action in a situation where Postal Service employees were performing postal services pursuant to a contract with the Postal Service; this, however, is not the situation here. Again, the issue here is whether the conduct of a private entity, acting through its employees, can be attributed to the government. Consequently, the Defendants' assertion that the SYI CPU employees are not Postal Service employees carries little weight.

With regard to the Defendants' argument that the Postal Service has minimal direct involvement with the daily operations of the SYI CPU, the court finds that the Postal Service's involvement is not so

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[11] The court notes, however, that the Postal Service has provided in-house training to SYI CPU employees.

minimal as to preclude a finding of entwinement with the SYI CPU. The Defendants claim that the Postal Service's involvement with the SYI CPU is no different from other situations in which the government has entered into contracts with private corporations but no state action was found. The court disagrees with the Defendants' claim. The Defendants are correct when they state that a private actor does not automatically become a state actor simply because of a contractual relationship with the government. In addition, the court agrees that the government, including the Postal Service, is free to contract with private parties. Yet, the court can differentiate the circumstances of this case from those of other cases in which the government has contracted with private entities. If, for example, the government wishes to have engines built for its airplanes, it may enter into a contract with an appropriate manufacturer (such as Pratt & Whitney) to have such services performed. A manufacturer such as Pratt & Whitney is a private entity that is in the business of building airplane engines; it provides these services for those entities, private and public, with whom it contracts. It is not the sole function of Pratt & Whitney to perform services pursuant to governmental contract. Here, on the other hand, the SYI CPU's only function is to perform its contract with the Postal Service. Indeed, the Church created SYI expressly for the purpose of operating the CPU, which, pursuant to the contract with the Postal Service, provides postal services. If there were no contract, the SYI CPU would not exist.

Furthermore, the court finds that the Postal Service's oversight of the SYI CPU is such that the

SYI CPU may be considered pervasively entwined with the government. The Postal Service, through its "Postal Operations Manual," sets forth instructions on how CPUs must operate; these instructions range from matters of appearance to matters of daily operation. (*See* dkt. # 49-B, Ex. 20, USPS 000012) ("The appearance of your unit reflects not only on you ... but also on the Postal Service.... It is very important to the success of your unit that your customers can recognize you as an official United States Post Office contract unit. The Postal Service has dedicated exterior and interior signage that will help you establish this identity."); (*Id.* at USPS 000021-000022) (instructing CPUs as to their "Daily Tasks.") Additionally, the contract between the Postal Service and SYI CPU gives the Postal Service broad oversight of the SYI CPU. That contract states: "The Postal Service[ ] reserves the right, without prior notice, to conduct audits and customer surveys and to review and inspect the supplier's performance and the quality of service at any time during the operating hours of the Contract Postal Unit. A written report will be submitted to the supplier for corrective action, if necessary." (*Id.*, Ex. 6, Section E.) Such oversight goes beyond the standard arms-length relationship into which contracting parties enter. Consequently, the court finds that the SYI CPU is so entwined with the Postal Service that its conduct may be deemed state action.

2. The Establishment Clause

A finding of state action does not end the court's analysis. Rather, the court must further determine whether the displays in the SYI CPU do, in fact,

violate the Establishment Clause of the First Amendment. In the court's view, Cooper is challenging the constitutionality of both the religious displays at the SYI CPU, and the contractual relationship between the Postal Service and SYI, a corporation set up by the Church.

"In addressing Establishment Clause challenges, the Supreme Court has observed that '[t]he First Amendment contains no textual definition of 'establishment,' and that the term itself is 'not self-defining.' " *Skoros v. City of New York,* 437 F.3d 1, 16 (2d Cir.2006) (quoting *McCreary County, Ky. v. ACLU of Ky.,* 545 U.S. 844, 874-75, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005)). "Most obviously, the Clause prohibits the establishment of a national or state church, but the Court has never construed its mandate to apply only to this most obvious proscription." *Id.* (citing *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)). "It has long been accepted that the Establishment Clause prohibits government from officially preferring one religious denomination over another: 'The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.' " *Id.* (quoting *Larson v. Valente,* 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33, (1982)). "[N]eutrality is the touchstone of First Amendment analysis[ ] ... [that] provides a sense of direction in evaluating the variety of problems that can arise under the Establishment Clause...." *Id.* (internal quotation marks and citations omitted).

In reviewing Establishment Clause claims, the courts "apply the three-prong analysis articulated by

the Supreme Court in *Lemon* ...." *Id.* " *Lemon* instructs that, consistent with the general neutrality objective of the Establishment Clause, government action that interacts with religion (1) 'must have a secular ... purpose,' (2) must have a 'principal or primary effect ... that neither advances nor inhibits religion,' and (3) 'must not foster an excessive government entanglement with religion.' " *Id.* (quoting *Lemon,* 403 U.S. at 612-13, 91 S.Ct. 2105). The court points out that the *Lemon* test has been much criticized over the years, and some members of the Supreme Court have called into question its usefulness. *See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 398, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (Scalia, J., concurring in the judgment) (likening the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, ... stalk[ing] our Establishment Clause jurisprudence ...."); *see also Skoros,* 437 F.3d at 17 n. 13 (collecting Supreme Court cases containing various criticisms of the *Lemon* test). "Nevertheless, the Supreme Court has never specifically disavowed *Lemon's* analytic framework." *Skoros,* 437 F.3d at 17 n. 13 (collecting cases). Indeed, the Second Circuit "has regularly relied on *Lemon* in evaluating Establishment Clause challenges and ... reiterated that 'the Lemon test continues to govern our analysis of Establishment Clause claims.' " *Id.* (quoting *Peck v. Baldwinsville Cent. Sch. Dist.,* 426 F.3d 617, 634 (2d Cir.2005)). Accordingly, this court must apply the *Lemon* test to Cooper's Establishment Clause challenge.

a. The Religious Displays at the SYI CPU

As the court has found there to be state action in this case, it shall first address Cooper's argument that the religious displays at the SYI CPU violate the Establishment Clause of the First Amendment.

i. Secular Purpose

The first prong of the *Lemon* test dictates that "[w]hen government action interacts with religion, ... the government purpose must be secular." *Id.* at 18. "The requirement is not intended to favor the secular over the religious, but to prevent government from 'abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters.' " *Id.* (quoting *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987)). So, for example, in a case where New York City had a policy that allowed certain Jewish and Muslim symbols to be displayed in schools in order "to foster mutual understanding and respect for the many beliefs and customs stemming from [the] community's religious, racial, ethnic and cultural heritage" and to "promote the goal of fostering understanding and respect for the rights of all individuals regarding their beliefs, values and customs," the Second Circuit held that the purpose of these religious displays was "[n]ot only ... clearly secular; ... [but] one in which there is a strong public interest." *Id.* at 18-19.

The court finds that the religious displays in the SYI CPU, *see supra* Part I.C, do not have a secular purpose. Those displays, which are evangelical in nature, were set up by the Church, whose mission is to "engage in the preaching of the Gospel of Jesus Christ," "establish ... Churches for the advancement

of the kingdom of Jesus Christ," and "send forth preachers and workers whose princip[al] objective shall be to promote the Kingdom of the Lord Jesus Christ." (*See* dkt. # 49-B, Ex. 2 ¶ 1(b).) Upon a brief review of the SYI CPU's displays, one finds, among other things, the following: "prayer cards," which encourage SYI CPU customers to submit prayer requests and join the Church in prayer; solicitations for donations to the Church's missionary organization; and, television displays of Church-related videos.[12] Unlike the religious displays in *Skoros,* whose purpose was not to endorse a particular religion, but rather promote the concept of "pluralism," it is clear that the purpose of these religious displays is to assist the Church in its above-stated mission to promote a particular religion, i.e., Christianity. There is no indication that the purpose of the SYI CPU's religious displays are meant to impart to the reasonable observer anything other than the Church's evangelical mission, and the court cannot fathom how one could argue otherwise.

ii. Primary Effect

"The second prong of the *Lemon* test mandates that the 'principal or primary effect' of the challenged government action 'must neither advance nor inhibit religion.' " *Skoros,* 437 F.3d at 29 (quoting *Commack Self-Serv. Kosher Meats, Inc. v. Weiss,* 294 F.3d 415, 430 (2d Cir.2002)). "[T]his analysis is 'highly fact-specific,' asking: 'Would a reasonable observer of the display in its particular context perceive a message of governmental *endorsement* or sponsorship of religion?' " *Id.*

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[12] This is not an exhaustive list, but merely a sampling, of the religious displays at the SYI CPU.

(emphasis in original) (quoting *Elewski v. City of Syracuse,* 123 F.3d 51, 53 (2d Cir.1997)). "[T]he concept of endorsement is not limited to government coercion or efforts at proselytization; it is intended to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others." *Id.* As the Second Circuit has stated,

> The endorsement test does not require courts to sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens .... Rather, it seeks to ensure that government does not make a person's religious beliefs relevant to his or her standing in the political community, ... thereby sending a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community....

Id. (internal quotation marks and citations omitted).

It is clear that the primary effect of the religious displays in the SYI CPU is to advance religion (in this particular case, Christianity). There is no serious contention made by the parties that a reasonable observer would perceive the SYI CPU's above-described religious displays as anything other than endorsements or sponsorships of the Church and its evangelical mission. Indeed, these displays put the Church's beliefs front and center, out for the public to see, endorsing the Church's form of Christianity and seeking outsiders to join the Church in its mission. Therefore, the court concludes

that SYI CPU's religious displays violate the second prong of the *Lemon* test.

iii. Entanglement

"The final prong of the *Lemon* test considers whether the challenged government action 'foster[s] excessive state entanglement with religion.' " *Id.* at 35 (quoting *Commack Self-Serv. Kosher Meats, Inc.*, 294 F.3d at 425). "Entanglement is a question of kind and degree." *Lynch v. Donnelly*, 465 U.S. 668, 684, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984). "[T]he First Amendment does not prohibit all interaction between church and state. The entanglement of the two becomes constitutionally 'excessive' only when it has 'the effect of advancing or inhibiting religion.' " *Skoros*, 437 F.3d at 36 (quoting *Agostini v. Felton*, 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997)). "Thus, entanglement analysis is properly treated as an aspect of *Lemon's* second-prong inquiry into ... [the] effect [if the government action]." *Id.* (internal quotation marks omitted). "The factors relevant to determining excessive entanglement are similar to the factors used to determine effect; a court considers the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." *Id.* (internal quotation marks omitted).

The court finds that the religious displays in the SYI CPU violate the third prong of the *Lemon* test. Unlike in *Skoros*, where the defendants attempted to categorize the holiday symbols displayed in the schools as "secular," the Defendants here make no such assertion. Rather, they admit that the religious displays are meant to support the mission of the

Church, whose non-secular character is manifest. There is nothing wrong, *per se*, with the Church exhibiting religious displays. Here, however, the Church is exhibiting such displays while it is performing its duties under a contract with the Postal Service, i.e., the U.S. Government. To an outsider, the fact that the SYI CPU's religious displays are in relatively close proximity to Postal Service displays (e.g., the Postal Service eagle) could indicate that, despite certain signs indicating otherwise, the Postal Service endorses the purpose and message of those religious displays. The court therefore finds that the religious displays in the SYI CPU violate the third prong of the *Lemon* test. Because the court has found there to be state action here, and because the court has further found that all the *Lemon* factors have been violated, the court holds that the SYI CPU's religious displays violate the Establishment Clause of the First Amendment.

b. The Contractual Relationship Between the Postal Service and SYI

Cooper does not only claim that the religious displays at the SYI CPU violate the First Amendment, he also appears to be asserting that the relationship between the Postal Service and the SYI is inherently unconstitutional. That is, Cooper wishes the court to declare that the contractual relationship between the Postal Service and SYI, which was created by the Church to operate the SYI CPU, inextricably entangles the government with a sectarian institution, thereby providing funds to a sectarian institution, which thereafter uses such funds for religious purposes. Cooper thus asks the court for an order permanently enjoining the Postal

Service from contracting out postal services to the Church and other religious institutions. The court declines to grant Cooper's request in this respect.

"It long has been established ... that the State may send a cleric, indeed even a clerical order, to perform a wholly secular task." *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 746, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976). Indeed, the Supreme Court "has never held that religious institutions are disabled by the First Amendment from participating in publicly sponsored social welfare programs." *Bowen v. Kendrick,* 487 U.S. 589, 609, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). For example, the Supreme Court has "upheld an agreement between the Commissioners of the District of Columbia and a religiously affiliated hospital whereby the Federal Government would pay for the construction of a new building on the grounds of the hospital." *Id.* (citing *Bradfield v. Roberts,* 175 U.S. 291, 20 S.Ct. 121, 44 L.Ed. 168 (1899)). As the Supreme Court noted,

> In effect, the Court [in *Bradfield*] refused to hold that the mere fact that the hospital was 'conducted under the auspices of the Roman Catholic Church' was sufficient to alter the purely secular legal character of the corporation, [*Bradfield,* 175 U.S.] at 298, 20 S.Ct. 121, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter.

Id. In addition, "[t]he notion that the Constitution would compel a religious organization contracting with the state to secularize its ranks is untenable in light of the Supreme Court's recognition that the

government may contract with religious organizations for the provision of social services." *Lown,* 393 F.Supp.2d at 249 (citing *Bowen,* 487 U.S. 589 at 609, 108 S.Ct. 2562, 101 L.Ed.2d 520).

Based upon the language of the cases cited above, the court cannot declare that, as a matter of law, the contract between the Postal Service and the SYI CPU violates the First Amendment. The contract between the Postal Service and the SYI is purely secular in nature. Under the contract, SYI is to operate the SYI CPU, which provides postal services. There is no indication in either the record or the parties' submissions that the contract calls for anything resembling "sectarian" or "religious" purposes. Therefore, although the SYI CPU is under the "auspices" of the Full Gospel Interdenominational Church, this is not sufficient to alter the SYI CPU's secular character.

Furthermore, the court points out that the contractual relationship between the Postal Service and SYI does not violate the three-pronged *Lemon* test.[13] The first prong, that the government's interaction with a religious organization must have "secular purpose," is, as the court noted above, satisfied. The Postal Service's interaction with SYI was to enter into a contract to perform a postal function, which is a secular, public service. The relationship between the Postal Service and SYI is not religious in nature, i.e., the Postal Service has not contracted for services that are in any way sectarian or religious.

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[13] The court has already detailed the *Lemon* test above, and need not do so again here.

The second prong, that the government's interaction with a religious organization must have a primary effect that does not advance religion, is also satisfied. The primary effect of the Postal Service's interaction with SYI is that the SYI CPU performs the secular, public postal services that otherwise would have been performed by the Postal Service (or another CPU). There is no indication that the Postal Service is "advancing" or "sponsoring" the Church's religion simply by entering into a contractual relationship with SYI; the Postal Service solicited bids for that contract from an entire community, not just from religious organizations. The fact that a religious organization happened to win that bid does not mean that the Postal Service was advancing or sponsoring religion.

The third prong, that the government's interaction with a religious organization must not foster an excessive entanglement with religion, is also satisfied. It is true, as the court discussed above, that the Postal Service oversees the operation of the SYI CPU. The SYI CPU's primary purpose, however, is to provide postal services. Thus, the Postal Service's oversight of the SYI CPU is related to that secular purpose, not to any religious purpose. In short, the Postal Service provides postal supplies to the SYI CPU and ensures that the SYI CPU is operating within the Postal Service's standards. From what the court can determine, the Postal Service has no direct interaction with the Church's religious activities. Therefore, although the religious displays in the SYI CPU violate the First Amendment, Cooper cannot demonstrate that the contractual relationship between SYI and the Postal

Service, in and of itself, violates the First Amendment.

The court also rejects Cooper's argument that the Postal Service is "distributing public funds" to SYI in violation of the First Amendment. It is true that "the Establishment Clause does prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith, and [the Supreme Court] ha[s] accordingly struck down programs that entail an unacceptable risk that government funding would be used to advance the religious mission of the religious institution receiving aid." *Bowen,* 487 U.S. at 612, 108 S.Ct. 2562. Cooper seems to imply, by using the word "distributing," that the Postal Service is simply giving away public money to a religious organization. The facts here, though, do not support the contention that the government is directly funding, or aiding, religion. The Postal Service has entered into a performance-based contract with SYI. This is not a case where the government is doling out money for nothing; rather, SYI receives whatever funds it is entitled to for services performed under the contract by the SYI CPU. That is, SYI earns its money. After SYI has earned its money, it is free, as any other person or organization would be, to use that money in whatever (lawful) way it sees fit.

In addition, the court points out that "[t]here is no effect of advancing religion by the government contracting with a sectarian organization unless there is some special benefit granted to the organization by virtue of the contract." *Comm. for Pub. Educ. and Religious Liberty v. Sec'y, U.S. Dep't of Educ.,* 942 F.Supp. 842, 867 (E.D.N.Y.1996)

(finding that "the mere payment of money to a religious institution as part of a commercial lease does not create an improper effect under the First Amendment"). The court does not see what "special benefit" the Postal Service has granted to SYI by virtue of their contract. The Postal Service has granted the "benefit" of that contract (i.e., permission for an organization to perform postal services for which the organization and Postal Service receive compensation) to thousands of organizations across the country. The court fails to see how that benefit is "special" to SYI.

Finally, the court notes the potential consequences of finding that the contractual relationship between the Postal Service and SYI is unconstitutional because SYI has a religious affiliation would be, in the court's opinion, overly severe. The Postal Service has demonstrated that it has CPUs all over the country. Some of those CPUs are run by religiously-affiliated organizations; for example, religiously-affiliated colleges and universities, in order to better serve their students, might enter into contracts with the Postal Service to operate CPUs on their campuses. In the court's estimation, a finding that such an arrangement is unconstitutional because the government is compensating, for services rendered, a religiously-affiliated college operating a CPU, is not supported by the case law and is not a holding that the Second Circuit or Supreme Court would endorse. Consequently, the court rejects Cooper's arguments insofar as they attack the contractual relationship between the Postal Service and SYI.

III. CONCLUSION

For the foregoing reasons, the Defendants' motion **(dkt.# 38)** is **GRANTED in part and DENIED in part,** and the Plaintiff's motion **(dkt.# 41)** is **GRANTED in part and DENIED in part.** The court has determined that: (1) for the purposes of the Establishment Clause of the First Amendment, the SYI CPU is a state actor; (2) the religious displays in the SYI CPU violate the Establishment Clause of the First Amendment; and (3) the contractual relationship between the Postal Service and SYI does not violate the Establishment Clause of the First Amendment. Therefore, the court hereby **ORDERS** the following:

(A) The Plaintiff's motion for summary judgment (dkt.# 41) is GRANTED in part with regard to the Plaintiff's request for a declaratory judgment. A *declaratory judgment* shall issue forthwith stating the following:

> **To the extent that Sincerely Yours, Inc., and all other individuals or entities, in the course of operating contract postal units or otherwise providing postal services pursuant to their contracts with the United States Postal Service, act in a manner that proselytizes or advances religion, including, but not limited to, the posting of religious displays that proselytize or advance religion, such conduct violates the First Amendment to the United States Constitution.**

(B) The Plaintiff's motion for summary judgment (dkt.# 41) is GRANTED in part with

regard to the Plaintiff's request for an injunction. An *injunction* shall issue whereby:

(1) Sincerely Yours, Inc., in the course of operating the Sincerely Yours, Inc. Contract Postal Unit or otherwise providing postal services pursuant to its contract with the United States Postal Service, shall cease from acting in a manner that proselytizes or advances religion, and shall remove any and all religious displays that proselytize or advance religion in the Sincerely Yours, Inc. Contract Postal Unit;

(2) the United States Postal Service shall provide adequate and ongoing notice to all contract postal units that, in the course of providing postal services, they shall not act in a manner that proselytizes or advances religion; and

(3) the Postal Service shall institute adequate and ongoing procedures for the monitoring of contract postal units to ensure compliance with the court's injunction prohibiting contract postal units, in the course of providing postal services, from acting in a manner that proselytizes or advances religion.

(C) The Plaintiff's motion for summary judgment (dkt.# 41) is DENIED with regard to all other forms of relief the Plaintiff seeks.

(D) The Defendants' motion for summary judgment (dkt.# 38), which the Intervenor Defendants have joined and adopted (*see* dkt. # s 59 & 60), is GRANTED with respect to all forms of relief that are not included in the

declaratory judgment and injunction, and DENIED with respect to the relief that the declaratory judgment and injunction allow.

The Clerk of the Court shall close this file.

SO ORDERED this 18th Day of April, 2007

/s/DJS
DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE

APPENDIX C
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BERTRAM COOPER, *Plaintiff,* *v.* U.S. POSTAL SERVICE, ET AL., *Defendants.*	No. 3:03CV01694 (DJS)

Decided and Filed: August 28, 2007
Entered: August 30, 2007

MEMORANDUM OF DECISION AND ORDER

Dominic Squatrito, District Judge.

Plaintiff, Bertram Cooper ("the Plaintiff") brought this action for declaratory and injunctive relief against Defendants United States Postal Service ("the Postal Service"), John E. Potter, and Ronald G. Boyne (collectively, "the Defendants"), and against Intervenor Defendants Full Gospel Interdenominational Church, Inc., Dr. Philip Saunders Heritage Association, Inc., and Sincerely Yours, Inc. ("SYI") (collectively, "the Intervenor Defendants"), alleging violations of his rights, and the rights of all citizens, under the Establishment Clause of the First Amendment to the United States Constitution. The court assumes that the parties are familiar with the background facts of this case, and

need not restate them in detail here. [1] In brief, this case involved whether, and to what extent, it is constitutional for the Postal Service to allow the Church to operate a business known as a contract postal unit ("CPU"), which, pursuant to a contract with the Postal Service, provides certain postal services to the public.

Now pending before the court is the "Motion to Alter or Amend Judgment" **(dkt. # 75)** filed by the Defendants, and the "Motion to Alter or Amend the Judgment Dated April 30, 2007, Pursuant to Fed.R.Civ.P. 59(e)" **(dkt. # 77)** filed by the Intervenor Defendants. The Plaintiff filed memoranda in response and opposition to the Defendants' and Intervenor Defendants' motions (*see* dkt. # s 85 & 86). For the reasons stated herein, the Intervenor Defendants's motion **(dkt. # 77)** is **DENIED,** and the Defendants' motion **(dkt. # 75)** is **GRANTED in part and DENIED in part.**

I. DISCUSSION

The Defendants and the Intervenor Defendants both move pursuant to Rule 59(e) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P.") to have the court modify the Declaratory Judgment and Injunction entered on April 30, 2007. The Intervenor Defendants argue that the removal of certain signs

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[1] The court set forth the background facts of this case in its April 18, 2007 Memorandum of Decision and Order, which granted in part and denied in part the Defendants' motion for summary judgment and granted in part and denied in part the Plaintiff's motion for summary judgment. *See Cooper v. U.S. Postal Service*, 482 F.Supp.2d 278 (D.Conn.2007).

from the contract postal unit operated by SYI[2] ("the SYI CPU"), would extirpate the necessity of the relief granted in the Declaratory Judgment and Injunction. The Defendants argue that paragraphs 2 and 3 of the Injunction, which relate to the Postal Service, should be omitted because: (1) the court made no findings that would support the conclusion that the Plaintiff is entitled to injunctive relief against the Postal Service; (2) the court made no findings that would support the conclusion that the Plaintiff has standing to seek injunctive relief with respect to any entity but SYI, or that the conduct of any entity but SYI proselytizes or advances religion; and (3) the Injunction is too vague to satisfy the requirements of Rule 65 of the Federal Rules of Civil Procedure. The Defendants also argue that the references to the Postal Service contained in the Declaratory Judgment should be omitted on the grounds that: (1) the court made no findings that would support the conclusion that the Plaintiff has standing to seek relief with respect to any entity but SYI; and (2) the court made no findings that would support the conclusion that relief would be warranted if the Plaintiff did have standing against the Postal Service.

The Plaintiff, in his opposition memoranda, rejects the Intervenor Defendants' arguments outright, and proposes an amended order, containing an altered declaratory judgment and injunction, that would allay some of the concerns raised by the Defendants. The court, having reviewed the

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[2] SYI is a corporation set up by the Church for the purpose of establishing and operating the contract postal unit.

Intervenor Defendants' and the Defendants' motions, shall address their arguments seriatim.

A. STANDARD FOR RULE 59(E) MOTION[3]

"Although Rule 59(e) does not prescribe specific grounds for granting a motion to alter or amend an otherwise final judgment, ... district courts may alter or amend judgment to correct a clear error of law or prevent manifest injustice." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir.2004) (internal quotation marks omitted). "A district court's denial of a party's motion to alter or amend judgment under Rule 59(e) is ... reviewed for an abuse of discretion." *Id.; see McCarthy v. Manson,* 714 F.2d 234, 237 (2d Cir.1983) (holding that rulings under Rule 59(e) are "committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion."); *Kregos v. Latest Line, Inc.*, 951 F.Supp. 24, 26 (D.Conn.1996) ("A motion for reconsideration is committed to the sound discretion of the court.")

In general, the three grounds justifying reconsideration are "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Virgin Atl. Airways, Ltd. v. Nat'l Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir.1992)

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[3] The court notes that motions to alter or amend a judgment may also be characterized as motions for reconsideration. *See Cioce v. County of Westchester,* 128 Fed.Appx. 181, 185 (2d Cir.2005)("[T]he district court properly construed the [plaintiff's] motion as one for reconsideration (which could also be characterized as a motion to alter or amend the judgment).") (citing Fed.R.Civ.P. 59(e)).

(internal quotation marks omitted). "The standard for granting [a motion for reconsideration] is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked-matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir.1995). "Such motions must be narrowly construed and strictly applied in order to discourage litigants from making repetitive arguments on issues that have been thoroughly considered by the court." *Range Road Music, Inc. v. Music Sales Corp.*, 90 F.Supp.2d 390, 391-92 (S.D.N.Y.2000). That is, "[a] motion for reconsideration may not be used to plug gaps in an original argument or to argue in the alternative once a decision has been made." *SPGGC, Inc. v. Blumenthal*, 408 F.Supp.2d 87, 91 (D.Conn.2006) (internal quotation marks omitted). "It is also not appropriate to use a motion to reconsider solely to re-litigate an issue already decided." *Id.* at 91-92.

B. THE INTERVENOR DEFENDANTS' RULE 59(E) MOTION

In their memorandum of law, the Intervenor Defendants state that the court "appeared most troubled by the signage at [the SYI CPU], especially two large signs, one on the outside and one on the inside." (*See* dkt. # 77, Memo. of Law, p. 1.) The signs the Intervenor Defendants reference here are those containing words or emblems representing the Postal Service. The Intervenor Defendants propose that the SYI CPU "remove the said two large signs ... as well as a third small sign inside .... [and] add an explanation to the term 'United States Contract

Postal Unit' that states: 'This is not an official post office, but a private entity, Sincerely Yours, Inc., which is providing postal services.' " (*Id.*, p. 2.) According to the Intervenor Defendants, the above-described changes would dislodge the SYI CPU from its position as a "state actor."

The court rejects the Intervenor Defendants' arguments. First, the Intervenor Defendants have not met the standard for a motion to alter or amend a judgment. The Intervenor Defendants do not point to an intervening change of controlling law or new evidence, nor do they assert that the court overlooked controlling decisions or data that would alter its prior decision. Thus, the Intervenor Defendants' motion warrants a denial on those bases alone. Second, although the signs at the SYI CPU played a part in the court's reasoning, they did not constitute the cornerstone of the court's April 18, 2007 decision. Because the parties have access to the court's April 18, 2007 decision, the court shall not now undertake the weighty task of recounting the analysis in that decision. Needless to say, the court's decision was not only based on the above-mentioned signs, but also on other significant factors that caused the SYI CPU to be a state actor. *See Cooper*, 482 F.Supp.2d at 292-95. Consequently, the Intervenor Defendants' motion to alter or amend the Declaratory Judgment and Injunction **(dkt.# 77)** is **DENIED.**

C. THE DEFENDANTS' RULE 59(E) MOTION

In their motion and supporting memorandum of law, the Defendants ask that the court alter or amend the judgment based upon the following: (1) the court made no findings that would support the

conclusion that the Plaintiff is entitled to injunctive relief against the Postal Service; (2) the court made no findings that would support the conclusion that the Plaintiff has standing to seek relief with respect to any entity but SYI, or that the conduct of any entity but SYI proselytizes or advances religion; and (3) the Injunction is too vague to satisfy the requirements of Rule 65 of the Federal Rules of Civil Procedure.[4] The Defendants essentially ask the court to erase all references to the Postal Service in the Declaratory Judgment and Injunction. The court declines to go so far. Nevertheless, the court agrees that the Declaratory Judgment and Injunction should be modified, and the court shall address those modifications below.

The court disagrees with the Defendants' argument that the court made no findings that would support the conclusion that the Plaintiff is entitled to injunctive relief against the Postal Service. A finding of state action is "premised upon the fact that 'the State is *responsible* for the *specific conduct* of which the plaintiff complains.' " *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 154 (2d Cir.2004) (emphasis in original) (quoting *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982)). The Defendants seem take the position that the Postal Service has no relation or involvement with this case, as if the Postal Service were a bystander and the dispute is between the

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[4] The court notes that the Defendants, in their summary judgment papers, failed to address the appropriateness of the relief sought in the Plaintiff's complaint. Nevertheless, the court shall address the Defendants' concerns.

Plaintiff and Intervenor Defendants only. The court rejects this position. In its April 18, 2007 decision, the court found that the Postal Service's contact with the SYI CPU is not so minimal as to preclude a finding of entwinement with the SYI CPU. *See Cooper,* 482 F.Supp.2d at 294. Additionally, SYI CPU performs postal services solely on account of its contract with the Postal Service, and the court has found that the Postal Service's oversight of the SYI CPU and its operations goes beyond the standard arms-length relationship into which contracting parties enter. *See id.* at 294-95.[5] Indeed, the court found that "the SYI CPU is so entwined with the Postal Service that the SYI CPU's actions may be considered the actions of the Postal Service." *Id.* at 292. Based upon the court's finding that the conduct of the SYI CPU can be attributed to the Postal Service, the court believes that the Plaintiff is entitled to injunctive relief against the Postal Service.

The Defendants also argue that the court's findings provide no basis for allowing injunctive and declaratory relief to the Plaintiff with respect to any other CPU other than the SYI CPU. The Defendants maintain that the Plaintiff is not entitled to the nation-wide injunctive relief against the Postal Service because his relief is limited to Article III standing requirements, and the scope of the

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[5] In the court's view, this oversight of the SYI CPU, to which SYI and the Postal Service contracted, does make the Postal Service liable for the SYI CPU's conduct here, and distinguishes this case from the cases cited to in the Defendants' memoranda of law (*see* dkt. # 76, pp. 3-5; dkt. # 90 pp. 5-10).

Injunction exceeded that limitation. "In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). "To ensure the proper adversarial presentation, [the Supreme Court has held] that a litigant must demonstrate that it has suffered a concrete and particularized injury that is either actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely that a favorable decision will redress that injury." *Massachusetts v. E.P.A.,* --- U.S. ----, ----, 127 S.Ct. 1438, 1453, 167 L.Ed.2d 248 (2007).

The court finds nothing in the record indicating the Plaintiff has suffered a concrete and particularized injury that is either actual or imminent at any CPU other than the SYI CPU. In addition, the Plaintiff appears to concede that he does not have standing entitling him to relief against any CPU other than the SYI CPU. Therefore, the court shall modify the Injunction accordingly. The court also shall modify the Declaratory Judgment to reflect the fact that the Plaintiff is entitled to relief specifically against the SYI CPU, and not against all CPUs in general.

The Defendants further argue that the Injunction is too vague to satisfy the requirements of Rule 65 of the Federal Rules of Civil Procedure. Rule 65(d) reads as follows:

> Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other

> document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them....

Fed.R.Civ.P. 65(d). "[D]istrict courts whose equity powers have been properly invoked indeed have discretion in fashioning injunctive relief...." *U.S. v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 495, 121 S.Ct. 1711, 149 L.Ed.2d 722 (2001); *see Forschner Group, Inc. v. Arrow Trading Co., Inc.*, 124 F.3d 402, 406 (2d Cir.1997) ("A district court has a wide range of discretion in framing an injunction in terms it deems reasonable to prevent wrongful conduct, ... and [the court of appeals] will not disturb on appeal the relief granted unless there has been an abuse of discretion ....") (internal quotation marks and citations omitted). Nevertheless, "[i]njunctive relief should be narrowly tailored to fit specific legal violations. Accordingly, an injunction should not impose unnecessary burdens on lawful activity." *Patsy's Brand, Inc. v. I.O.B. Realty, Inc.*, 317 F.3d 209, 220 (2d Cir.2003) (internal quotation marks omitted). "[U]nder Rule 65(d), an injunction must be more specific than a simple command that the defendant obey the law." *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 51 (2d Cir.1996). In light of Rule 65(d) and the relevant case law, the court shall modify the Injunction [6] so that it specifies what conduct is being prohibited. Consequently, the

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[6] Because the court is modifying the injunction, the declaratory judgment shall also be modified so that its language parallels the language of the amended injunction.

Defendants' motion to alter or amend the Declaratory Judgment and Injunction **(dkt.# 75)** is **GRANTED in part and DENIED in part.**

II. CONCLUSION

The court hereby **ORDERS** the following:

(A) The Intervenor Defendants' "Motion to Alter or Amend the Judgment Dated April 30, 2007, Pursuant to Fed.R.Civ.P. 59(e)" (dkt.# 77) is DENIED.

(B) The Defendants' "Motion to Alter or Amend Judgment" (dkt.# 75) is GRANTED in part with regard to the declaratory judgment. An *amended declaratory judgment* shall issue forthwith stating the following:

> **To the extent that Sincerely Yours, Inc., in the course of operating the Sincerely Yours, Inc. Contract Postal Unit or otherwise providing postal services pursuant to its contract with the United States Postal Service, acts in a manner that proselytizes or advances religion by posting or presenting religious displays, prayer cards, advertisements, donation solicitations, and telecommunication videos or broadcasts that proselytize or advance the religion of the Full Gospel Interdenominational Church, Inc. or its affiliates, such conduct violates the First Amendment to the United States Constitution.**

(C) The Defendants' "Motion to Alter or Amend Judgment" (dkt.# 75) is GRANTED in part and DENIED in part with regard to the

injunction. An *amended injunction* shall issue whereby:

> **(1) Sincerely Yours, Inc., in the course of operating the Sincerely Yours, Inc. Contract Postal Unit or otherwise providing postal services pursuant to its contract with the United States Postal Service, shall remove from the Sincerely Yours, Inc. Contract Postal Unit any and all religious displays, prayer cards, advertisements, donation solicitations, and telecommunication videos or broadcasts that proselytize or advance the religion of the Full Gospel Interdenominational Church, Inc. or its affiliates;**
>
> **(2) the United States Postal Service, in its oversight of the Sincerely Yours, Inc. Contract Postal Unit, shall: (a) prohibit Sincerely Yours, Inc., in the course of operating the Sincerely Yours, Inc. Contract Postal Unit or otherwise providing postal services pursuant to its contract with the United States Postal Service, from posting or presenting religious displays, prayer cards, advertisements, donation solicitations, and telecommunication videos or broadcasts that proselytize or advance the religion of the Full Gospel Interdenominational Church, Inc. or its affiliates; and (b) monitor the Sincerely Yours, Inc. Contract Postal Unit to**

ensure compliance with paragraph (1) of this amended injunction.

SO ORDERED this 28th day of August, 2007.

/s/DJS
DOMINIC J. SQUATRITO
UNITED STATES DISTRICT JUDGE

APPENDIX D

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;— between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const., art. III, s 2, cl. 1.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

No. 09-808

Supreme Court, U.S.
FILED
JAN 20 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SINCERELY YOURS, INC., ET AL.,

Petitioners,

v.

BERTRAM COOPER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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QUESTIONS PRESENTED

To serve the residents of downtown Manchester, Connecticut, the United States Postal Service ("USPS") established a contract postal unit ("CPU"), which is operated by the petitioners' church under an extraordinarily detailed USPS contract and set of postal regulations. While providing the local public with official USPS services, the church advanced its religious mission by posting Christian religious displays throughout the post office, including invitations to submit prayer cards and contributions to the church. Respondents are local residents who use the CPU and object to the religious displays and solicitations they confront there. The Second Circuit unanimously affirmed a district court decision, which the USPS did not appeal, holding that the religious activities in the CPU are subject to, and violate, the Establishment Clause. The questions presented are:

1. Whether the Second Circuit's decision, which was consistent with precedent in this Court and in the other federal circuits, correctly held that respondents have standing to maintain their Establishment Clause claim because they have been personally and directly affected by the challenged conduct?

2. Whether the Second Circuit correctly held that proselytizing religious displays and solicitations in the CPU, which operates on behalf of and under the banner of the USPS and provides USPS services to local residents, are subject to and violate the Establishment Clause?

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PARTIES TO THE PROCEEDING

In addition to Sincerely Yours, Inc., the other defendant-petitioners are Full Gospel Interdenominational Church, Inc., and Dr. Phillip Saunders Heritage Association, Inc.

The intervenor-respondents are Kimon N. Karath and Leslie Strong (hereafter "respondents"). The original plaintiff was Bertram Cooper, who moved to a nursing home and no longer lives in Manchester, Connecticut or frequents the Manchester CPU. Gary Chipman was also an intervenor, but he moved from Manchester to another town in Connecticut and, as a result, no longer patronizes the Manchester CPU.

The United States Postal Service, along with John E. Potter, as Postmaster General of the United States Postal Service and Ronald G. Boyne, as Postmaster of the Manchester, Connecticut Post Office, were defendants in the district court, but the federal government withdrew its Second Circuit appeal on behalf of those parties, and they have not been involved in the case since then.

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COUNTERSTATEMENT OF THE CASE

I. FACTUAL BACKGROUND

The petitioners, Sincerely Yours, Inc., Full Gospel Interdenominational Church, Inc., and Dr. Phillip Saunders Heritage Association, Inc. (collectively, the "Church") operate a CPU for the USPS on Main Street in Manchester, Connecticut. App. 2a & n.1.[1] The USPS instituted the CPU program to fulfill its statutory obligation to provide postal services to patrons not adequately served by existing, traditional post offices. *Id.* at 5a. The Manchester CPU is run by the Church, and it prominently displays proselytizing materials throughout the CPU. *Id.* at 9b-13b. "The express and admitted purpose of the religious material is to raise awareness for the mission sponsored by the Church and to spread the Church's Christian message." *Id.* at 27a.

The respondents are residents of Manchester who live in the vicinity of and regularly use the Church's CPU. *Id.* at 4a. They unavoidably encounter the religious displays in the CPU when they go there to obtain USPS services and products. *See id.* at 11a-12a; *see also id.* at 13b-14b. These displays include prayer cards and boxes soliciting contributions to the Church that were on the counter where postal

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[1] Citations to "App." are to petitioners' appendices. The citations with an "a" after the page number refer to the Second Circuit's opinion, and the citations with a "b" after the page number refer to the district court's opinion.

patrons obtain USPS services and products. *Id.* at 10b-10c; *see also id.* at 11a.

A. CPUs Operate Under the Federal Postal Service Monopoly as Units of the USPS

The U.S. Constitution provides Congress with the power "[t]o establish Post Offices," Art. I § 8, and Congress, in turn, has delegated that power to the USPS, "award[ing] the USPS a monopoly over the carriage of letter mail." *Id.* at 4a.[2] It is therefore a crime to set up a "post office" without authority from the USPS. *See* 18 U.S.C. § 1729; *see also* App. at 4a.

Congress also mandates that the USPS shall "serve as nearly as practicable the entire population of the United States." 39 U.S.C. § 403(a); *see also* App. at 4a-5a. To fulfill that mandate, the USPS not only operates traditional (or "classified") post offices, but also contracts with private entities to operate CPUs to "furnish postal services to places where it is not otherwise geographically or economically feasible to build and operate official 'classified' post offices." App. at 5a.

Because "[i]t is very important to the success of [the CPU] that customers can recognize [it] as an

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[2] This monopoly is codified under the Private Express Statutes, 39 U.S.C. §§ 601-606 and 18 U.S.C. §§ 1693-1699, which "have existed in one form or another since passed by the First Congress in 1792." *Brennan v. U.S. Postal Serv.*, 439 U.S. 1345, 1347 (1978).

official United States Post Office contract unit," *id.* at 36b (quoting the Postal Operations Manual), the USPS tightly controls the look and function of the CPU to establish a "uniform image," *id.* at 9a (quoting the standard CPU contract). The USPS's standard form CPU contract therefore specifies the precise appearance of the CPU, including the layout, the furnishings, and the lighting. *See id.* The USPS, through its standard CPU contract, "agrees to pay for (among other things) the construction of postal service counters and other build-out requirements, all according to detailed specifications" to ensure a "uniform image." *Id.* The contract also appoints a "Contracting Officer's Representative" or "COR" "to ensure compliance with the CPU contract and governing regulations, and to provide general oversight." *Id.* at 9a-10a. The USPS makes it clear that the CPU "reflects not only on" the entity operating it, "but also on the [USPS]." *Id.* at 6a-7a (quoting USPS Contract Postal Unit Operations Guide).

B. The Manchester CPU Is Required to Present Itself to the Public as an Official Unit of the USPS

For over fifteen years, the USPS has relied on CPUs to ensure that the citizens of Manchester, Connecticut, have access to USPS products and services. *Id.* at 8a. After the "Community Place" CPU in Manchester suspended its operations in 2001, the USPS solicited proposals to replace it. *Id.* The Church was one of two bidders, and the USPS ultimately

awarded the contract to the Church on November 21, 2001. *Id.* The Church subsequently incorporated Sincerely Yours, Inc. ("SYI") "for the purpose of operating the CPU." *Id.*

The Manchester CPU "offers a variety of postal services including Express, Priority, and First Class domestic mail; international mail; insurance, certification, and delivery confirmation services: Post Office Box rentals; and sales of stamps, stationery, and other packing products." *Id.* at 10a. The USPS sets the prices for these products and services. *Id.* at 11a. Under the performance-based postal unit contract, all revenues from sales of USPS products and services at the unit belong to the USPS, but 18% of those sales, and 33% of all post office box rentals, are paid to the Church. *Id.* at 9a.

As required by its contract with the USPS and in order to obtain business from USPS customers, the Church has taken numerous measures to ensure that the Manchester CPU is understood to be an outlet of the USPS. For example, there is a "relatively substantial sign on the outside of the [Church's] CPU that contains the words 'United States Post Office' and displays the Postal Service's aquiline emblem." *Id.* at 32b. Under the USPS contract, the USPS paid for (among other things) "the construction of postal service counters and other build-out requirements, all according to detailed specifications." *Id.* at 9a. And the CPU's interior contains "official USPS postal supplies, paperwork, and mailing boxes." *Id.* at 10a.

C. The Church Used the Manchester CPU to Proselytize Local Postal Patrons

There are numerous religious displays posted by the Church throughout the Manchester CPU. *Id.* at 11a; *see also id.* at 9b-13b. These displays are intended to further the mission of the Church. *See id.* at 27a; *see also id.* at 39b-40b. The Church's mission is to "engage in the preaching of the Gospel of Jesus Christ . . . [and] establish . . . Churches for the advancement of the kingdom of Jesus Christ," and to "send forth preachers and workers whose princip[le] objective shall be to promote the Kingdom of the Lord Jesus Christ." *Id.* at 39b-40b (alteration supplied).

Inextricably intertwined with the official USPS signs, emblems, and materials required to be displayed at the CPU, are numerous evangelical messages and displays about the Church and its religious mission, including:

- "[A] large religious display that informs customers about Jesus Christ and invites them to submit a request if they 'need prayer in their lives'" is located "directly to the right of the postal counter and slat wall," *id.* at 9b-10b;
- "[A] pile of 'prayer cards' and a box into which postal service customers can put their prayer requests" is located "[d]irectly on the postal counter," *id.* at 10b;
- A display "containing a framed advertisement for World-Wide Lighthouse Missions, the missionary organization incorporated by

> the Church to which the SYI CPU's profits are donated . . . sits directly opposite a shelving unit containing official USPS postal supplies and forms and above a table used by customers filling out USPS paperwork," *id.* at 11b;
>
> - The same display also "offers biblical quotations and explains that the organization is 'Endeavoring to Reach the World with the Love of Jesus Christ, one life at a time,'" *id.*;
> - A "World-Wide Lighthouse Missions" donation jar also "sits on the postal counter," *id.*; and
> - "[A] television monitor display[ing] Church-related religious videos" is located "[t]o the left of the postal counter . . . and in plain view . . . of customers waiting in line at the postal counter," *id.* at 12b.

See generally id. at 9b-12b (offering a more complete description of the religious displays).

Local Manchester residents who use this downtown postal unit for USPS postal services and supplies cannot avoid encountering these pervasive religious messages and practices. Contrary to the mischaracterizations in the petition, the religious displays are not "passive," Pet. at 21-22, and the local resident respondents are not simply "uncomfortable observer[s]" or "concerned bystanders," *id.* at 15-17, but active participants seeking government services at their local post office, who are offended by the proselytizing religious practices they encounter there.

II. PROCEDURAL BACKGROUND

Offended by having to confront these religious displays at the CPU, Mr. Cooper, the original plaintiff in this case, complained to CPU employees but "was told that [he] could go somewhere else if [he didn't] like it." App. at 12a (quoting Affidavit of Bertram Cooper). Instead, Mr. Cooper filed this action in October 2003 against the USPS. *Id.*[3] Subsequently, the Church obtained permission to intervene as a defendant. *Id.*

On cross-motions for summary judgment, the district court held that, for the purpose of the Establishment Clause, the Manchester CPU is a state actor, and the religious displays at the CPU violate the Establishment Clause. *Id.* at 12a-13a. The court issued declaratory and injunctive relief against both the USPS and the Church barring those displays. *Id.* at 13a.

Both the USPS and the Church moved to alter or amend the judgment. *Id.* The Church offered to cure the Establishment Clause violation "by removing the two large signs and one small sign containing the words 'United States Post Office,' and by adding a sign indicating that SYI was a 'private entity,'" *id.*, but the USPS objected, noting that the official USPS signage was contractually required and could not be

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[3] The complaint also named as defendants U.S. Postmaster General John E. Potter and Manchester Postmaster Ronald G. Boyne.

removed. Def. Postal Serv.'s Resp. to Intervening Defs.' Mot. to Alter or Amend J., filed June 4, 2007, at 2-3 (district court docket no. 83). The district court denied the Church's motion, but, without objection from the plaintiff, granted the portion of the USPS's motion requesting that the judgment be amended to limit the scope of the injunction to the Manchester CPU only. *See id.*

Although all of the defendants initially appealed the district court's rulings to the United States Court of Appeals for the Second Circuit in October 2007, the U.S. government voluntarily dismissed the appeal filed on behalf of the USPS (along with its employees U.S. Postmaster General John E. Potter and Manchester Postmaster Ronald G. Boyne). *See id.* The district court granted a stay pending appeal on November 1, 2007.

While the appeal was before the Second Circuit, it became clear that Mr. Cooper, whose health had required him to move into a nursing home in West Hartford, was in all likelihood not going to return to the Manchester CPU. Three other local residents – Gary Chipman,[4] Kimon Karath, and Leslie Strong – were granted permission by the Second Circuit, without objection from the Church, to intervene to defend the district court's judgment on appeal. *Id.* at

---

[4] After filing the motion to intervene, Gary Chipman moved from Manchester and no longer uses the Manchester CPU. As a result, the respondents are Kimon Karath and Leslie Strong.

4a. The intervenors stood in the same position as Mr. Cooper. In their affidavits in support of their intervention motion, they attested that they patronized the local CPU, objected to the religious displays they encountered there, and adopted the allegations and claims of the complaint. *Id.* at 4a, 11a-12a; Declarations of Kimon N. Karath and Leslie Strong, dated Apr. 28, 2008, ¶¶ 3-4 (filed with the Second Circuit on Apr. 30, 2008 in support of the Motion of Proposed Intervenors, also filed Apr. 30, 2008).

The Second Circuit issued its unanimous decision on August 20, 2009, holding that the respondents had standing, App. at 18a, that the CPU is subject to the Establishment Clause as a government actor, *id.* at 22a, and that the Church's displays of religious materials in the CPU "clearly fail the *Lemon* test" and violate the Establishment Clause, *id.* at 27a.

The Second Circuit observed that standing required a "'direct and personal stake' in the controversy" *Id.* at 18a. Because Mr. Cooper claimed "that he was made uncomfortable by direct contact with religious displays that were made a part of his experience using the postal facility nearest his home, and that upon complaint, he was advised to alter his behavior," he had established an injury "sufficient to support standing." *Id.* The Second Circuit focused on the original plaintiff, Mr. Cooper, but acknowledged that the intervenors were "similarly aggrieved." *See id.* at 4a, 17a-18a.

In holding that the CPU functioned as a state actor, the Second Circuit relied on the "public function" test and concluded that, to the extent that the CPU accepts and processes mail, sells postal products, and participates in the safe carriage of mail, "it performs . . . 'activit[ies] that traditionally ha[ve] been the exclusive, or near exclusive, function of the State.'" *Id.* at 22a (alteration in original) (quoting *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 151 (2d Cir. 2004)).

"Having determined that" the CPU "is operating as a state actor under the public function test," the Second Circuit applied the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to determine whether the religious displays violated the Establishment Clause. *Id.* at 23a. Under the *Lemon* test, the court must consider whether the conduct at issue: (1) has a secular purpose; (2) has a principal effect that neither advances nor inhibits religion; and (3) does not bring about an excessive government entanglement with religion. *Id.* at 25a. As to the secular purpose requirement, the Second Circuit held that the religious displays in the CPU "fail spectacularly." *Id.* at 27a. It went on to conclude:

> Having failed at the first juncture, there is no need to proceed further in the *Lemon* test, although it is no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion (and might arguably

> entangle the government excessively with religion).

Id. On that basis, the Second Circuit affirmed the district court's decision that the religious displays in the CPU violate the Establishment Clause.

The Second Circuit, however, did amend the district court's remedy. Rather than requiring the Church to remove all religious displays from the CPU, the court remanded so that the injunction could be revisited and amended to bar religious displays only in the "primary area serving the public function" and therefore be limited to the "extent of the state action." *Id.* at 31a-32a.

The Church filed its petition for a writ of certiorari on November 17, 2009.

REASONS FOR DENYING THE WRIT

The Church's petition offers no hallmarks of a case worthy of this Court's consideration. On the principal issue – whether the Second Circuit's standing analysis was correct – the petition concedes that there is no conflict among the circuits. On the contrary, it acknowledges that the circuits have consistently interpreted and applied this Court's standing rules in Establishment Clause cases, just as the Second Circuit did here. Pet. at 15-16 (citing uniform case law from *ten* of the federal circuits).

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The petition essentially asks the Court to depart from this uniform body of precedent and adopt a principle it has repeatedly rejected – that an injury must be physical or economic to confer standing. Petitioners advocate such a drastic change in the law, which would effectively eliminate Establishment Clause challenges to many types of governmental religious activity, because it is the only possible way to challenge standing here. The respondents are local residents who patronize their local post office and unavoidably encounter pervasive, proselytizing religious displays and solicitations there, which they find objectionable. In other words, they are precisely the type of plaintiffs who have standing under existing law.

Nor does the Second Circuit's decision on the merits of the Establishment Clause claim warrant this Court's review. Based on the highly unusual facts of this case, in which the Church operates the local post office on behalf of and under extensive regulation by the USPS, the Second Circuit reached the unassailable conclusion that the religious displays and solicitations that confront postal patrons there are properly considered government action subject to Establishment Clause limits. Equally unremarkable is the Second Circuit's holding that the proselytizing religious displays violate the Establishment Clause, because they "fail spectacularly" the requirement that they serve a secular purpose. App. at 27a.

The Second Circuit's highly fact-specific decision breaks no new ground and has limited precedential impact. The relationship between the USPS and operators of CPUs is unique, and has no bearing on government contractor cases. The Church here is not a mere contractor; it operates as an arm of the USPS, providing government services to the public that the USPS is statutorily obliged to provide. And the relief granted is limited to the one postal unit in downtown Manchester, Connecticut, and even there it precludes religious displays only in those areas of the unit that are devoted to providing postal services to the public.

Under the circumstances, it is not surprising that the U.S. government chose not to pursue an appeal in the Second Circuit on behalf of the USPS. Nothing in the Second Circuit's unanimous decision makes the case worthy of this Court's attention.

I. THE SECOND CIRCUIT PROPERLY HELD, CONSISTENT WITH THE LAW OF THIS COURT AND OTHER FEDERAL CIRCUITS, THAT RESPONDENTS HAVE STANDING, AND REVIEW OF ITS DECISION IS NOT WARRANTED

The Second Circuit applied this Court's long-standing case law – precedent consistently followed by the federal circuits – in concluding that respondents had established an injury sufficient to support standing based on their direct, personal, and unwelcome contact with the proselytizing religious displays and activities in their local post office. *See id.*

14a-18a. Petitioners acknowledge the absence of any circuit conflict – indeed they note that the Second Circuit's standing analysis is consistent with the "settled practice in the lower courts," Pet. at 17, citing as examples consistent case law from ten of the federal circuits. *Id.* at 15-16.[5] They argue that all of

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[5] Petitioners cite the following cases, which demonstrate the absence of a split among the circuits: *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1251-53 (9th Cir. 2007) (finding standing where plaintiff claimed "direct contact with the purportedly offensive anti-religious symbol at issue"); *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1222-23 (10th Cir. 2005) ("Allegations of personal contact with a state-sponsored image suffice to demonstrate . . . direct injury" sufficient to support standing.); *Books v. Elkhart County*, 401 F.3d 857, 861 (7th Cir. 2005) (standing for plaintiff who alleged direct and unwelcome contact with a religious display); *ACLU Nebraska Found. v. City of Plattsmouth*, 358 F.3d 1020, 1029 (8th Cir. 2004) (plaintiff has standing because he alleged "government establishment of religion to which he, personally and directly, has been subjected"), *vacated on other grounds and expressly aff'd on standing after reh'g en banc*, 419 F.3d 772, 775 n.4 (8th Cir. 2005); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247, 255 n.3 (3d Cir. 2003) (personally encountering a religious display on multiple occasions confers standing); *Adland v. Russ*, 307 F.3d 471, 478 (6th Cir. 2002) (finding standing based on "direct and unwelcome contact" with the challenged display); *Suhre v. Haywood County*, 131 F.3d 1083, 1090 (4th Cir. 1997) ("The cognizable injury caused by personal contact with a public religious display may thus satisfy the injury-in-fact requirement for standing to bring an Establishment Clause case."); *Washegesic v. Bloomingdale Pub. Schs.*, 33 F.3d 679, 682 (6th Cir. 1994) (holding that standing requires allegations of unwelcome, direct contact with the offending conduct); *Murray v. City of Austin*, 947 F.2d 147, 150-51 (5th Cir. 1991) (concluding that personal contact with challenged religious symbol through receipt of "many items of correspondence from the City"

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the courts have somehow gotten it wrong, and invite this Court to step in and create a new and more stringent standing requirement for Establishment Clause cases. The standard they suggest makes no sense and directly contravenes this Court's jurisprudence.

A. Petitioners Seek a Dramatic and Unwarranted Change in Long-Established Standing Principles

1. Standing principles are well-established, although often difficult to apply. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). "To meet the standing requirements of Article III, '[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (emphasis omitted) (quoting

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sufficient to find standing); *Foremaster v. City of St. George*, 882 F.2d 1485, 1490-91 (10th Cir. 1989) (holding that plaintiff's "allegations of direct, personal contact suffices as non economic injury"); *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) (finding standing premised on "direct contact with the offensive conduct"); *Hawley v. City of Cleveland*, 773 F.2d 736, 739-40 (6th Cir. 1985) (finding standing based on plaintiff's allegation that the challenged conduct impairs his use and enjoyment of an airport). Plaintiffs also cite *Kaplan v. City of Burlington*, 891 F.2d 1024, 1027 (2d Cir. 1989), which assumes that plaintiffs, who were "residents of the area [and] who ha[d] been exposed to the" religious display "in the course of their daily activities," had standing without expressly addressing the issue.

Allen, 468 U.S. at 751). Standing in Establishment Clause cases is no different than it is for other claims. *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 489-90 (1982).

There is little doubt that the respondents here meet those requirements. They are local residents who patronize the local post office and object to the religious displays and solicitations they unavoidably encounter when they go there for government services and products. Indeed, they are precisely the plaintiffs that should be bringing a case like this one – people who are directly affected by the challenged conduct and have a personal, concrete stake sufficient to litigate the case vigorously and seek meaningful relief. *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972) (injury requirement is to ensure that party has "a direct stake in the outcome").

2. Faced with this reality, petitioners argue for a dramatic change in the "injury" requirement in Establishment Clause cases to eliminate non-physical, non-economic injuries as a basis for standing. They claim that "the psychological consequence presumably produced by an observation of conduct with which one disagrees" does not constitute an injury for standing purposes. Pet. at 19 (quoting *Valley Forge*, 45 U.S. at 485). But their argument turns on a single statement taken out of context from *Valley Forge*, is inconsistent with subsequent case law, and presents no issue warranting this Court's review.

Valley Forge addressed the consequences of conduct *not personally experienced.* The plaintiffs in that case were from Maryland, Virginia and Washington, D.C., but the challenged land transfer – which they only learned about "through a news release" – took place in Pennsylvania. 454 U.S. at 486-87. In short, they complained of conduct that had no direct impact on their own lives, contravening the most basic standing principle. *Valley Forge* does not preclude standing based on the harm one incurs when forced to encounter objectionable religious displays; it merely requires that it be directly and personally experienced. Indeed, the Court in *Valley Forge* made it clear that it was "not retreat[ing] from [its] earlier holdings that standing may be predicated on non-economic injury," 454 U.S. at 486, demonstrating that the very issue petitioners claim is worthy of this Court's attention is based on a misreading of *Valley Forge.*

Petitioners labor to distinguish other Establishment Clause decisions that are inconsistent with their strained interpretation of *Valley Forge.*[6] In

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[6] Although not Establishment Clause cases, this Court's decisions in *Allen* and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), held that injury for standing purposes may be predicated on non-physical, non-economic harm. In *Lujan*, this Court found that "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for [the] purpose of standing." 504 U.S. at 562-63. In *Allen*, while holding that the plaintiffs did not have standing, the Court noted that "the stigmatizing injury often caused by

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School District of Abington Township v. Schempp, 374 U.S. 203, 205 (1963), for example, the injury to the interests of school children, who were "directly affected" by mandatory Bible readings in their public schools, "surely suffice[d] to give [them] standing to complain." *Id.* at 225 n.9. Petitioners argue that the *Schempp* plaintiffs were a captive audience forced to absorb an active religious message, whereas, in this case, the respondents "mere[ly] observ[ed] . . . the church's passive displays in the non-coercive setting of the CPU." Pet. at 22.

But the displays in the CPU are not passive; they actively seek the participation of the postal patrons in the Church's religious practice through prayer and financial contribution. Nor is the setting "non-coercive," as the USPS has a monopoly on certain

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racial discrimination . . . is sufficient in some circumstances to support standing." 468 U.S. at 755. The plaintiffs in *Allen* did not have standing because they "were not personally subject to the challenged discrimination." *Id.* Thus, both *Lujan* and *Allen* recognize that a plaintiff can establish harm for standing purposes by demonstrating a personally-experienced injury that has no physical or economic manifestation.

Petitioners rely on *Allen*, claiming that the respondents here were "not subject to discriminatory treatment or restraint at the church's postal unit." Pet. at 20. The respondents, however, are pursuing an Establishment Clause violation and not a violation of the Equal Protection Clause, and therefore the absence of discriminatory treatment is irrelevant. The respondents' personal objection to unwelcome contact with petitioners' religious displays in their local post office establishes standing in this case.

postal services and the Church's CPU is the post office serving downtown Manchester. And, contrary to the repeated characterization in the petition, the respondents are not simply "offended observers" or "concerned bystanders." They are residents actively seeking government services in their local post office who cannot avoid being proselytized when they transact business there. The respondents' ability to utilize a more distant post office is no different than the ability of the students in *Schempp* to "absent themselves upon parental request" from the challenged Bible readings, which did not defeat standing in that case. 374 U.S. at 224-25.

This Court has reached the merits in a litany of Establishment Clause cases involving similar injuries based on offensive religious displays. As the Fourth Circuit explained,

> [t]he best proof of our reading of *Valley Forge* lies in the actions of the Supreme Court itself. In two religious display cases subsequent to *Valley Forge*, *Allegheny County v. ACLU*, 492 U.S. 573 . . . (1989), and *Lynch v. Donnelly*, 465 U.S. 668 . . . (1984), the Court has proceeded to the merits of the challenges to the displays and found no infirmity in the standing of plaintiffs alleging direct contact with them.

Suhre, 131 F.3d at 1088. That line of precedent in this Court – considering Establishment Clause challenges to religious displays and practices where direct contact and personal offense is the only injury – has

continued unabated.[7] As acknowledged in the petition, Pet. at 15-16, there is a similar line of uniform precedent in the federal circuits.[8] When the courts have found standing absent, the plaintiffs have not personally experienced the challenged conduct.[9]

3. If this Court were to adopt petitioners' analysis, few if any citizens would ever have standing to challenge many of the most blatant possible Establishment Clause violations. No local resident would have standing to bring an Establishment Clause challenge here, even if the Church conducted

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[7] *See, e.g., McCreary County v. ACLU*, 545 U.S. 844 (2005) (addressing whether posting of the Ten Commandments on courthouse walls violated the Establishment Clause, despite absence of any allegations of any economic or physical injury); *Van Orden v. Perry*, 545 U.S. 677, 682 (2005) (addressing the constitutionality of a display of the Ten Commandments in a public park, noting that plaintiff personally "encountered the Ten Commandments monument during his frequent visits to the" state capitol "for the purpose of using the law library in the Supreme Court building."); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (addressing the merits of plaintiffs' challenge to prayer before school football games though plaintiffs appeared to have suffered only a psychological injury).

[8] *See supra* note 5.

[9] *See, e.g., ACLU-NJ v. Wall*, 246 F.3d 258, 266 (3d Cir. 2001) (plaintiffs lacked standing where they had not seen the religious display at issue, except for purposes of the litigation, and did not claim offense from the display); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497-98 (5th Cir. 2007) (plaintiffs lacked standing where there was no evidence they had ever "attended a school board session at which a prayer like those challenged here was recited").

religious services in the CPU and offered holy communion to postal patrons when they sought to buy stamps or collect their mail – so long as those patrons did not suffer physical or economic injury. That has never been, and should never be, the law.

B. The Second Circuit Correctly Held that Respondents Have Standing

Respondents have suffered a direct, personal injury and, accordingly, the Second Circuit correctly held that they have standing. They are local residents of Manchester, Connecticut, who personally patronize the CPU to obtain USPS products and services. App. at 4a, 10a-12a. *See Lujan*, 504 U.S. at 565-66 ("[A] plaintiff claiming injury from environmental damage must use the area affected by the challenged activity and not an area roughly 'in the vicinity' of it.") (quoting *Lujan v. National Wildlife Federation*, 497 U.S. 871, 887-888 (1990)). They are not geographically-divorced from the challenged conduct, nor do they assert a claim to vindicate the rights of others. They suffered personal, direct, and unwelcome contact with the religious displays and practices in the CPU – a sufficiently direct injury to have a meaningful, personal stake in the controversy and its outcome.

Elevating form over substance, petitioners suggest that the respondents lack standing because they state in their declarations that they "object" to the religious displays in the post office, rather than

saying they suffer "offense" as a result of those displays. Pet. at 26. Common sense dictates that the harm caused by direct, unwelcome contact with proselytizing religious displays can be described in more than one way, and standing law does not require invocation of a single talismanic word or phrase.[10] Indeed, elsewhere the petition argues that terminology does not matter because no words conveying psychological harm would be sufficient to establish standing. *Id.* at 19.

In their declarations supporting their motion to intervene, the respondents also specifically adopted the allegations and claims contained in the complaint, and the Second Circuit found that they stood in the same position and had suffered the same injury as Mr. Cooper. App. at 4a ("Cooper stopped using the CPU when he entered a nursing home, but the suit has continued on behalf of three intervenors who are similarly aggrieved."). There is, therefore, no basis for the petitioner's alternative suggestion (Pet. at 30) that the Court grant certiorari and declare the respondents' claims – which remain as important to them today as earlier in the case – to be moot.

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[10] In fact, the definitions of "offense" and "object" overlap. The definition of "offense" includes "the state of being displeased, insulted, or morally outraged." *Webster's Third International Dictionary* 1566 (2002). The definition of "object" includes "to feel aversion or distaste for something." *Id.* at 1555.

II. THE SECOND CIRCUIT PROPERLY CONCLUDED THAT RELIGIOUS ACTIVITIES IN THE CPU ARE SUBJECT TO, AND VIOLATE, THE ESTABLISHMENT CLAUSE

Petitioners challenge the Second Circuit's conclusion that the religious displays violate the Establishment Clause and its conclusion that the displays are attributable to the government and therefore subject to Establishment Clause limitations in the first place.

1. Petitioners' argument on the merits of the Establishment Clause violation borders on frivolous. It is obvious that proselytizing religious displays serve no "secular purpose," as required by the first part of the test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[11] As the Second Circuit starkly put it, the Church's displays of religious materials throughout the CPU "fail spectacularly under the first inquiry of *Lemon*." App. at 27a. The court added that "it is no great stretch to say that the religious materials on the postal counter would also have a principal effect of advancing religion (and might arguably entangle the government excessively with religion)." *Id.*[12]

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[11] To satisfy the three-pronged *Lemon* test, challenged conduct must: (1) have a secular purpose; (2) have a principal effect that neither advances nor inhibits religion; and (3) not bring about an excessive government entanglement with religion. 403 U.S. at 612-13.

[12] The USPS implicitly recognizes this as well, as its regulations expressly bar the display of religious materials in all "classified," full-service post offices. App. at 7a-8a & 8a n.7.

2. Petitioners' real claim is that the religious displays are not attributable to the government because the Church is a private actor. To be sure, the Church is a private party, and it is free to pursue its religious mission as it pleases – but not while it is operating the local post office on behalf of, under the banner of, and under the strict regulation of, the USPS, offering postal services that the USPS is obliged to provide to local residents, and sharing the revenues from the sale of those services. As the petition notes, the key is not the Church's speech, but "the context of its presentation," Pet. at 14, and in the context of this case, the Church cannot advance its own religious mission in the context of running the local post office for the USPS.

The Second Circuit concluded that the petitioners are "a state actor pursuant to the public function test, but only as to those areas of [the CPU] where the public function takes place, namely the postal counter, the postal boxes, and the shelving unit that stores and displays postal materials." App. at 23a. The district court reached the same result, but using a different analysis. It held that "[i]n certain circumstances, a private organization may be so entwined with government that its conduct may be deemed *per se* state action," App. at 29b, and found that the "CPU is so entwined with the Postal Service

that the . . . CPU's actions may be considered the actions of the Postal Service," *id.* at 30b.[13]

Both conclusions are correct. Under either the public function test or the entwinement test, it is clear the Church is stepping into the shoes of the USPS in downtown Manchester for the purpose of operating the post office there. Petitioners ask the Court to disregard that context and analyze the religious displays independent of their location in a post office. *See* Pet. at 33-35. But that is precisely what the local residents are challenging in this case. The Church and its members are free to proselytize and preach in their Church. But operating the local post office for the USPS provides a unique platform for the Church to advance its religious mission, because that is where the members of the community must come to obtain USPS products and services. In that context, the Establishment Clause limits the USPS operator's ability to convey its religious messages and solicit support for the Church from postal patrons.[14]

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[13] In support of its conclusion, the district court focused on the extensive USPS oversight of the CPU and the required USPS design and signage, which are intended to ensure public recognition of the CPU as an arm of the USPS. App. at 31b-36b.

[14] Petitioners argue that the Court should separate the public function of operating a postal unit from the "space" in which that function takes place. *See* Pet. at 34. But the Church is permitted to perform that *function* only in the agreed-upon *space* that meets detailed specifications set by the USPS and

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3. Petitioners mischaracterize this case, despite its obviously limited facts and holding, as one with broad implications. They suggest that the Second Circuit decision might affect "the rights of . . . innumerable private religious speakers whose expression arises in the context of a contract or other mutually beneficial relationship with the government." *Id.* at 36. But this is not a government contractor case. The Church is not simply selling goods or services to the government. It is running the post office in downtown Manchester, Connecticut – stepping into the shoes of the federal government and taking on a government function exclusively belonging to the USPS. The Church provides USPS services to the local residents under the banner of the USPS, and uses that position to advance its religious mission. The Second Circuit's application of traditional Establishment Clause limits to the Church's activities as a USPS operator is a narrow, fact-bound decision that does not warrant intervention from this Court.

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that conforms with the uniform image of the USPS. Without that space, the Church could not operate the CPU. Moreover, the Second Circuit took pains to limit the reach of the injunction to those areas of the CPU in which the Church performs a public function, to separate the areas in which the Church provides post office functions from any areas in which it offers religious materials. App. at 31a-32a.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

SINCERELY YOURS, INC., ET AL.,
Petitioners,

v.

BERTRAM COOPER, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This case presents the question of whether parties announcing an ideological objection to government speech, policy, or conduct they have perceived may thereby gain access to federal court to litigate their Establishment Clause grievance. "It is inevitable that government will adopt and pursue programs and policies" that are "contrary to the profound beliefs and sincere convictions of some of its citizens." *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). If the correspondingly inevitable "objection" and "offense" of ideologically affected citizens constitutes an injury under Article III, then the doors to federal court truly are open to all partisans seeking a forum to air their complaints. But this is precisely the arrangement this Court condemned in *Valley Forge* when denying "injury" status to this ubiquitous form of offense.

Respondents' interpretation of *Valley Forge* as merely imposing a "direct observation" requirement on offended observers, rather than excluding their offense altogether from the category of "injury" under Article III, misses the obvious and reads into that case a rule of pointless formality. Such an artificial hurdle could be easily surmounted by any party simply by arranging for direct observation of the matter sought to be challenged. Moreover, respondents' interpretation implies that the Court merely imposed a prudential mechanism to inconvenience and thus thin the ranks of potential plaintiffs, rather than doing what the Court said it was doing: applying the "rigorous Art. III

requirements" to exclude non-injury from court. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 475 (1982).

Respondents' testimony merely that they "object" to the church's displays in its CPU cannot qualify them for standing under Article III if the "rigorous requirements" of that provision are to serve any meaningful function.

On the merits, it is undisputed that the church is the sole source of the speech to which respondents object, that the church's speech describes its own outreaches, and that the church presents that speech on its own property. The USPS not only did not encourage or participate in that speech, it even arranged placement of a prominent sign on the transaction counter disclaiming its support for the church's messages. Pet. at 6. Yet Respondents incomprehensibly characterize the Second Circuit's classification of the church's speech as governmental as "unassailable," Opp. at 12, and assert that the church's challenge to the lower court's Establishment Clause finding "borders on frivolous." *Id.* at 23.

Yet respondents never back up those characterizations. In fact, they entirely avoid discussion or even mention of any part of the church's critique of the Second Circuit's unprecedented classification methods. The court of appeals wholly disregarded this Court's repeated example of the requisite method for assessing contested speech under the Establishment Clause, and reached a result in conflict with several First

Amendment standards. Respondents' conspicuous evasion of the church's arguments seems an implicit concession.

This Court should grant review.

REPLY TO FACTUAL DISCUSSION

Throughout their brief, respondents rely upon insinuating allegations that the record evidence does not support. For instance, respondents state that they are "offended" by the church's speech, Opp. at 6, that they are "directly affected" by that speech, *id.* at 16, that they "unavoidably encounter" the church's displays, *id.* at 1, and that they "cannot avoid being proselytized" at the church's facility. *Id.* at 19. None of this can be found in the record. The evidence shows only that respondents "object" to the church's displays – nothing more. Pet. at 27. There is no evidence that respondents are "offended" by any of the content of the materials found at the CPU, assuming they have even taken it upon themselves to read any of that content -- a fact which is not in evidence, either.

Respondents also imply the church conducts something like an evangelistic enterprise directed at patrons of the CPU. But respondents' incessant use of the characterization "proselytizing" as applied to the church's speech (Opp. at i, 1, 5, 6, 12, 13, 19, 22, 23) is simply gratuitous. None of the speech presented in the CPU falls into this category; nor have respondents given any justification for that description. Elsewhere, respondents oddly (and repeatedly) characterize the church as engaged in religious or proselytizing "activities" or "practices" at

the CPU (Opp. at i, 6, 13, 19, 21, 23) – which is not true. The unremarkable reality is that there is found in the CPU a few unobtrusive displays which contain information about the church and certain of its predominantly humanitarian outreaches. *See* JA73-79 (¶¶ 9-11); JA91-114.[1]

Respondents call the church "an arm of the USPS," Opp. at 13, a "unit of the USPS," Opp. at 2, and – no less than 16 times – call the church's CPU "the local post office" or "the post office." Opp. at i, 6, 12, 13, 16, 18, 19, 21, 24, 25, 26. All false.[2] The town of Manchester has a post office located about two and a half miles from the church's CPU. JA964. (Indeed, it was a matter of factual dispute in the district court whether Mr. Cooper had to travel farther from his home to get to the church's CPU than to the Manchester post office. App. 13b-14b.)

Respondents also allude to the purportedly extensive and strict regulation of the church's CPU as a result of the contract between it and the USPS (presumably to imply – contrary to law – a merged identity between the contracting parties). *See* Opp. at i, 3, 12, 24. *But see United States v. Orleans*, 425 U.S. 807, 815 (1976) ("by contract, the Government may fix specific and precise conditions to implement

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[1] Respondents inscrutably object that these displays are not "passive" because some of their text solicits a response from the reader. Opp. at 18. This is no different from any advertisement.

[2] Respondents (Opp. at 4) join the district court below (App. 32b) in failing to mention that the "United States Post Office" sign they describe outside the church's facility also contains the words "contract unit," and is joined by the "Sincerely Yours, Inc." signs and decals identifying the facility. JA181, JA88.

federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs . . . into federal governmental acts"). But that contract is apparently not comprehensive enough for respondents, who seek to add additional requirements to those on which the Postal Service and church have agreed. To respondents' chagrin (and acknowledgment, Opp. at 23 n.12), the contract has nothing to say about the speech of the private CPU operators at their own facility. JA1050.

ARGUMENT IN REPLY

I. RESPONDENTS' "OBJECTION" TO THE CHURCH'S SPEECH IS EVEN FURTHER FROM COGNIZABLE INJURY THAN WAS COOPER'S ASSERTION OF OFFENSE RULED ON BY THE COURT BELOW.

Respondents concede that the original plaintiff Mr. Cooper moved out of town and "in all likelihood" (Opp. at 8) would not again encounter the challenged displays. *See also id.* at ii. Respondents concede the same for intervenor plaintiff Gary Chipman. *Id.* at ii, 8 n.4. Indeed, respondents concede that neither Cooper nor Chipman are any longer proper parties to this litigation. *Id.* at 8 n.4 ("As a result, the respondents are Kimon Karath and Leslie Strong"). The Second Circuit's exclusive focus on Cooper's standing is thus indefensible unless the allegations of the remaining intervenors are in all material respects identical to his. They are not. The intervenors allege only that they encounter and "object" to the religious displays. Unlike Cooper, they thus do not even allege the basics of "offended

observer" standing. (That intervenors "adopted the allegations and claims of the complaint," Opp. at 9, would not change this. "Adopting allegations" that speak of matters personal to Mr. Cooper does nothing other than reiterate allegations about Mr. Cooper, not present new information about the intervenors. Intervenors expressly made their own standing allegations, and the term they chose was "object.")

While an "I object" allegation might include being "offended," as respondents point out, Opp. at 22 n.10, it also includes far, far more. Indeed, if merely seeing and "objecting" gives one Establishment Clause standing, then the requirement of individualized injury is a farce. All one need do is visit the challenged display and state one's objection. This is not "offended observer" standing (an already improper theory of Article III intervention), but the still more expansive "objecting observer" standing. Respondents Karath and Strong – the only ones whose claims are not concededly moot – therefore lack standing.

Even if "objecting observer" standing were equated with "offended observer" standing, this would not be grounds for denying review, but rather for granting it. For it would illustrate how far the lower courts – and especially the court below – have strayed from Article III limits. The Second Circuit concluded that "the *fact of exposure* becomes the basis for injury and jurisdiction" in religious display cases. App. 15a (emphasis added). Respondents assert their injury to be "personal objection to unwelcome [visual] contact" with the church's displays in its CPU. Opp. at 18 n.6. This Court has

never endorsed "objecting observer" standing, but rather has repudiated it in *Valley Forge*.

II. ARTICLE III INJURY STATUS TURNS ON THE NATURE OF THE HARM, NOT THE PROXIMITY TO ITS SOURCE.

Respondents offer that the church's argument "turns on a single statement taken out of context from *Valley Forge*[.]" Opp. at 16. The statement they refer to is that "the psychological consequence presumably produced by an observation of conduct with which one disagrees" does not constitute "injury sufficient to confer standing under Article III." 454 U.S. at 485.

Respondents urge that this restriction in *Valley Forge* only applies to "consequences of conduct *not personally experienced*." Opp. at 17 (emphasis in original). But that is not what *Valley Forge* says. The Court explained that Article III injury does not encompass the psychological consequence of "an *observation* of conduct" that one disagrees with – not of "conduct one did *not* observe" (though that, too, would certainly be disqualified). 454 U.S. at 485. It is the nature of the injury, not the proximity of its provocation, that the Court addresses in *Valley Forge*. *See*, *id.* at 487 n.23 (Court explaining that a party's geographic nearness to the challenged transfer was not its focus, but instead whether the harm alleged is a cognizable "injury").

The Court makes this same point in *Allen v. Wright*, 468 U.S. 737 (1984). "If the abstract stigmatic injury were cognizable, standing would extend nationwide to all members of the particular

[offended] racial groups[.]" *Id.* at 755-56. That is, if "offended observing" were a cognizable injury under Article III, its consequence would be near-universal standing. This Court has never implied that the same form of "offense" can be a cognizable injury for some, but not others. It either is, or is not, an "injury" under Article III. As in *Valley Forge*, so in *Allen*, the Court said it is not. "Recognition of standing in such circumstances would transform the federal courts into 'no more than a vehicle for the vindication of the value interests of concerned bystanders.'" *Id.* at 756 (citation omitted).

III. RESPONDENTS' REMAINING ARGUMENTS IN FAVOR OF THEIR STANDING ARE UNAVAILING.

Respondents note that this Court has on occasion decided on the merits cases that were brought on "offended observer" theories of standing. Opp. at 19-20. This is irrelevant to their claim. The exercise of jurisdiction is not precedent for the existence of jurisdiction. "'The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions.' *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted)." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 478-79 (2006). *See also United States v. L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio").

Respondents also protest that if offended observers cannot sue, then no one can challenge displays that allegedly violate the Establishment Clause. Opp. at 20. But this Court has already rejected precisely that argument. "The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop the War,* 418 U.S. 208, 227 (1984). "This view would convert standing into a requirement that must be observed only when satisfied." *Valley Forge,* 454 U.S. at 489. And even if no one could sue, the political branches remain available for the pursuit of redress.[3]

Respondents repeatedly assert (without citation) that the church argues that standing may only be shown by physical or economic injury. Opp. at 12, 16, 21. The church makes no such claim. Mental injuries (such as those resulting from coercion) certainly may give rise to standing. The church asserts only what this Court stated in *Valley Forge* and *Allen*: the psychological unease accompanying ideological disagreement is not injury for purposes of Article III. That rule implies no further limitation such as respondents suggest.

Finally, as earlier noted, Respondents defend their standing by alleging that patrons "cannot avoid being proselytized" when they visit the CPU. (Opp.

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[3] Respondents' resort to their hypothetical of the church offering "holy communion" to strangers buying stamps (Opp. at 21) is offensive and absurd. It is offensive because it shows a total lack of understanding of what Holy Communion is, and thus is a crude caricature of clergy. And it is absurd because this does not happen, and never would.

at 19.) Assuming that description, the same would be true if the CPU were located next to a church with street-side religious displays or invitations to attend services. Must the courts require a spatial separation of CPUs from neighboring religious institutions? How far must application of this idea of a requisite "religion-free landscape" reach? Would standing lie for challenges to private speech presented adjacent to courthouses and other government buildings? Is not the better course, regarding private displays both outside and inside, to ask the bothered viewers simply to avert their eyes? *See Cohen v. California*, 403 U.S. 15, 21 (1971). Or does profanity enjoy greater protection than religious speech? *See Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 767 (1995) (plurality).

IV. RESPONDENTS LEAVE UNDEFENDED THE LOWER COURT'S HANDLING OF THEIR ESTABLISHMENT CLAUSE CLAIM.

Respondents entirely avoid petitioners' critique of the Second Circuit's method of attributing government status to the church's speech. That court refused to apply the form of analysis that this Court's Establishment Clause case law directs be used for the question at issue here. *See* Pet. at 32. Further, the Second Circuit mishandled even the alien tests it did employ, by both reaching an unmerited conclusion on the status of the church's contract performance, and then in extending that status beyond the reach of its justification – to the church's speech. Pet. at 34-35. It is little wonder

that respondents did not pursue an analytical defense of that methodology.[4]

Respondents instead simply announce that both the district court and court of appeals have classified the church's speech as governmental, and that these conclusions are "correct." Opp. at 25. In support of that opinion respondents merely assert that the church has assumed the role of the USPS. *Id.* This of course begs the very question at issue.

Respondents' position ultimately is that there can be no such thing as a "contract postal unit," but rather all postage sales locations must be federal government post offices for purposes of the Establishment Clause. *See supra* at 4 (noting respondents' repetitive identification of CPU as "the local post office"). If that is the rule, then those CPUs in private residences, religious colleges and bookstores, seminaries, Catholic sisters organizations (*see* Pet. at 3-4), and indeed anywhere else where religious speech is presented at the private postal sales venue, are vulnerable to targeting by offended observers aiming to muzzle the private operators. But the price of such litigation will be to hamper the value of CPUs as an instrument of extending the availability of postal services.

CONCLUSION

This Court should grant review.

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[4] Respondents offer no defense either to the Second Circuit's subsequent failure to abide the boundaries of the *Lemon* test when applying it to the church's speech. Pet. at 35-36.

Respectfully submitted,

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